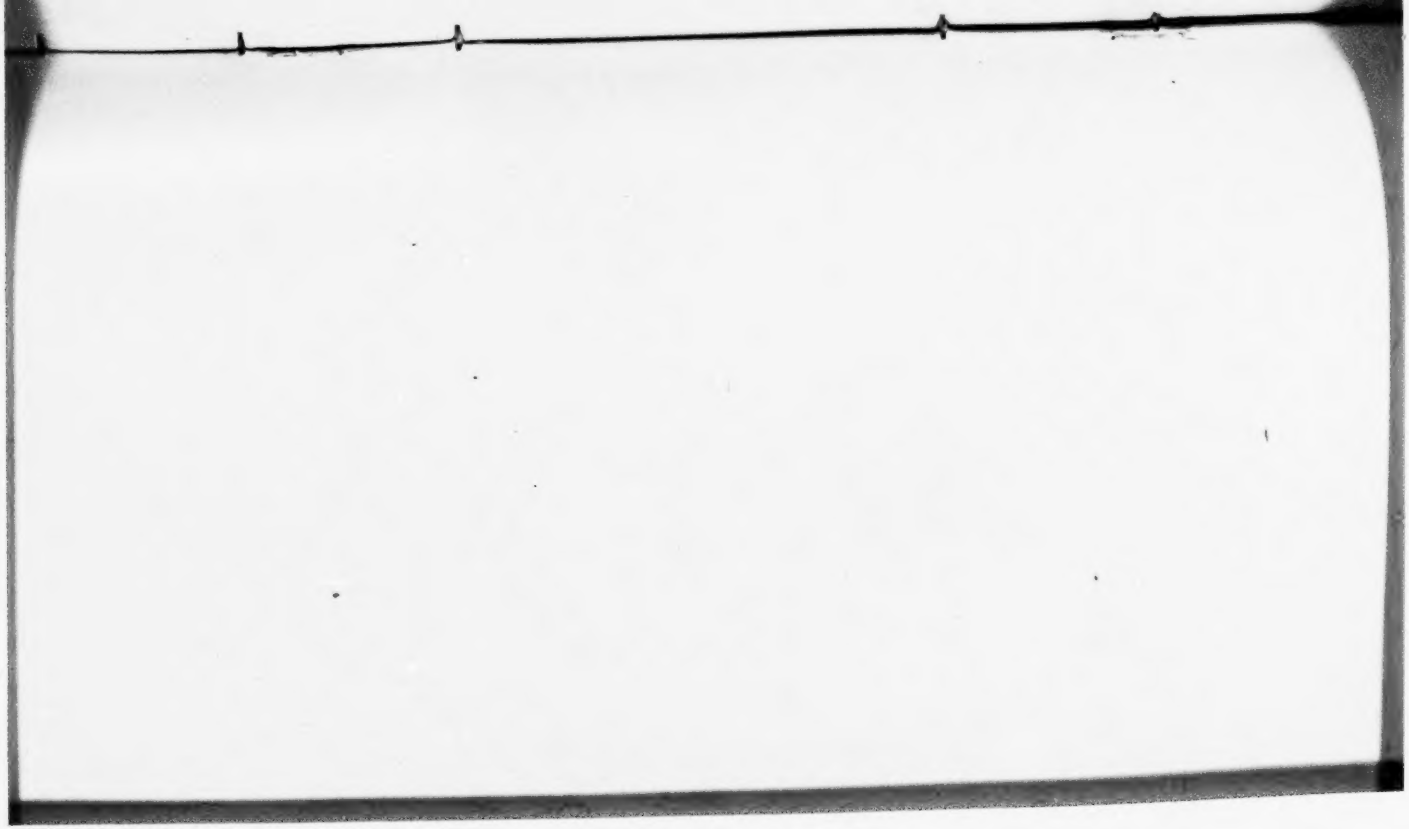

No. 551. Oct. Term, 1896. 15.

Brief of Plaintiff in Error.

Brief of Jones v James for P. E.

THE UNITED STATES OF AMERICA.

Filed Dec. 7, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 551.

DEC 7 1896

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN D. JONES,
FRANCIS B. JAMES,
Counsel for Plaintiff in Error.

JONES & JAMES, Attorneys.

(16,330.)

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EPITOME OF BRIEF.

I.—First Count of Indictment — Questions as to.

(1.) Where a statute which provides for the punishment of a crime does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective. (*Post*, page 22.)

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment, which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective. (*Post*, page 22.)

II.—Second Count of Indictment — Questions as to.

(1.) Where a rate of duty is placed on many species of goods under a generic name, and one specie thereof is specifically named in the free list, such generic name applies to every specie of that class, except the one specified in the free list. While punctuation may be disregarded, it is the duty of a Court to carry out the expressed and not the unexpressed intention of Congress. A Court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpreting a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen. (*Post*, page 25.)

(1a.) The Act of August 27, 1894 (28 Stat., 534), paragraph 338, places a duty on precious stones, and paragraph 467 places diamonds on the free-list. An indictment charging the smuggling of diamonds states no crime. (*Post*, page 25.)

(2.) An indictment should directly allege facts constituting a crime, and nothing should be left to conjecture or inference. Although the law defines a crime in generic terms, the indictment

should specify species and descend to particulars. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment must so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion will not be sufficient. (*Post*, page 25.)

(2a.) If paragraph 338 of the Act of Aug. 27, 1894 (28 Stat., 534), places a duty on some kinds of diamonds; and paragraph 467 places other kinds of diamonds on the free-list, an indictment for smuggling is not sufficient which merely charges the unlawful bringing in of "diamonds," but must specify a kind of diamonds other than those mentioned in the free-list. A mere legal conclusion in such indictment "that they were subject to duty" is not such an allegation, because the facts must be alleged, so an inspection of the record will show as a matter of law that they are subject to duty, and thus amenable to the smuggling law. (*Post*, page 26.)

III. — Second Count of Indictment — No Proper Conviction Under.

(1.) The omission to get a consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, and the arrival of the ship at Philadelphia, the demand for the diamonds at Philadelphia by a Revenue Officer, who makes himself known as such, and the getting of the diamonds from the state-room, and delivering the same to him, does not constitute smuggling. (*Post*, page 35.)

(2.) There can be no conviction for an attempt to smuggle, on an indictment charging smuggling. (*Post*, page 35.)

(3.) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after overt-acts of an attempt. (*Post*, page 35.)

(3a.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state-room on a ship at Liverpool, omitting them from a ship's manifest, steaming the ship into the port at Philadelphia, accompanied by an intention to smuggle, when nothing more is done, while they may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, do not amount to more than overt-acts of preparation, and there is no overt-act of an attempt to smuggle. (*Post*, page 35.)

(3b.) When such diamonds remain in the state-room of the steamer, where they had been placed at Liverpool, and a Revenue officer boards the ship at Philadelphia, and making himself known as such, demands the diamonds, and the Captain goes to the state-room, gets the diamonds and delivers them up to the officer, there is no overt act of an attempt to smuggle. (*Post*, pages 35–36).

IV. — Evidence Erroneously Admitted.

(1.) A person sworn as a witness should be permitted to state only facts to which he was a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declarations made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible. (*Post*, page 49)

(1a.) When a sea captain claims that a stranger to him in Europe induced him to smuggle diamonds into America, and said sea captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the captain arrested by a revenue officer, and a day after the seizure the captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is incompetent, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy. (*Post* page 49.)

(2.) Hearsay evidence is not competent to corroborate the statements of a witness made upon the stand. (*Post*, page 49)

(2a.) A court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe, but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing court should correct, although not excepted to, or assigned for error. (*Post*, page 49)

V. — Evidence Erroneously Excluded.

(1.) In every case the following are pertinent hypotheses: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of the evidence of the witness. It is competent to in-

troduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury. (*Post*, p. 56.)

(1a.) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or thirty minutes; that the conversation was carried on in Flemish by a friend of the Captain; that the stranger wrote an address on a piece of paper, and the only thing he said was, "by Adams Express," which was in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds, could not make use of the cut diamonds in his business, he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypotheses that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to pertinent hypotheses, the Court must admit it; its weight is for the jury. (*Post*, p. 56.)

(1b.) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 W. Fourth St., Cincinnati, and handed it to him; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia, February 11, 1896, was arrested, and the diamonds seized. On his arrest, and thereafter, he claimed to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper, which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypotheses that the witness, Captain Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared

between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said times; and ought to have been admitted, and it was error for the Court to exclude it. (*Post*, pp. 56–57.)

VI.—Charge of Court to Jury — Part Excepted to.

(1.) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court. *Post*, page 69.)

(2.) A charge of a Court to a jury should cover the whole case and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt. (*Post*, page 69)

(2a.) The defendant was charged with importing contrary to law and with smuggling diamonds. A sea captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (*a*) that a friend in the presence of the defendant gave him the diamonds; (*b*) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (*c*) that he had been in the habit of bringing over similar small packages, and always reporting them to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses, or all of the testimony of one witness, and withdraws from the jury certain hypothesis material to the question of guilt. (*Post*, page 69.)

VII.—Answer of Court to Request Number Ten for Special Instruction.

(1.) It is error for a court in answer to the request for a special instruction to affirm said point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness. (*Post*, page 77)

(1a.) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find

the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt and inconsistent with any hypothesis of innocence. The Court answered, affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charged as testified to by the prosecuting witness. The effect of such charge was to withdraw from the jury all of the evidence of all of the witnesses, except that of Captain Loesewitz, and confined his testimony to so much thereof as pertained to the smuggling charge, as testified to by him. (*Post*, page 77.)

VIII.—Error for Refusing Application for Dedimus.

(1.) Revised Statutes of the United States, Section 866, which provides that any court of the United States may grant a *dedimus potestatem* in any case where it is necessary in order to prevent a failure or delay of justice, applies to criminal cases. (*Post*, page 79.)

(1a.) A person charged with smuggling presented proof in support of an application for a *dedimus* that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (d) that from the amount of the prosecuting witness's income and expenditures, a part of his income was derived from sources other than his wages; (e) record evidence of the prosecuting witness's prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The Court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure or delay of justice, and the action of the Court was based upon a misapprehension of law and fact. (*Post*, page 79.)

IX.—Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541. (*Post*, page 85.)

(1a.) Where a person was indicted and convicted for a violation of Section 2865, and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania. (*Post*, page 85.)

THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, *Plaintiff in Error,* *vs.* THE UNITED STATES, *Defendant in Error.*	No. 551. (16,330)

Brief on behalf of Plaintiff in Error.

MAY IT PLEASE THE COURT:

On behalf of Herman Keck, plaintiff in error, we respectfully submit the following brief, to-wit:

STATEMENT OF THE CASE.

Action to Reverse.— This is an action (original record, pp. 223–229; printed, pp. 118–120) to reverse the judgment of the District Court of the United States for the Eastern District of Pennsylvania, whereby and wherein Herman Keck, plaintiff in error, was convicted by a jury (original record, p. 35; printed, p. 12) of a violation of Sections 2865 and 3082 of the Revised Statutes of the United States, and was by the judgment of the Court sentenced to fine and imprisonment (original record, pp. 45–46; printed, pp. 15–16).

Indictment.— May 18, 1896, at the May Term, 1896, of the District Court of the United States, for the Eastern District of Pennsylvania, an indictment containing three counts was returned against Herman Keck, plaintiff in error (original record, pp. 3–8; printed, 1–2)

First and Third Counts.—The first count charged him in the very language of the statute with importing diamonds contrary to law, contrary to the provisions of Sections 3028 of the Revised Statutes of the United States (original record, pp. 3–4; printed, p. 1). The third count likewise charged him with importing diamonds contrary to law, contrary to the provisions of the same section (3028) of the Revised Statutes of the United States, in that he violated the law by concealing diamonds in a small box, contrary to the provisions of Section 2802 of the Revised Statutes of the United States. (Original record, pp. 6–7; printed, p. 2.)

Second Count.— The second count charged him with smuggling diamonds contrary to the provisions of Section 2865 of the Revised Statutes of the United States (orginal record, pp. 4–6; printed, 1–2).

Application for Dedimus Potestatem.— On the 26th day of May, eight days after the indictment, Herman Keck moved to quash the indictment (original record, pp. 8–12; printed, pp. 3–4). And this motion the Court overruled (original record, p. 13; printed, p. 4). And then he demurred to the indictment (original record, pp. 14–17; printed, pp. 5–6). And this demurrer the Court overruled (original record, p. 17; printed, p. 6). On the same day he filed an application in writing for a dedimus potestatem, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof he presented an affidavit, setting forth important matters, which

clearly would have been material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said application; to which ruling of the Court Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignments of error (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day the United States presented an answer to the application for the dedimus potestatem (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day the Court refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22), in the following language, to wit:

"First.— That the statute relied upon is not applicable to the criminal court nor to the trial of causes therein.

"Second.—That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of granting it avoided."

And defendant excepted, which exception was allowed by the Court (original record, p. 34; printed, p. 12). This is assigned as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119).

Third Count of Indictment — Questions as to.— The third count of the indictment can be dismissed from discussion, because the evidence wholly failed to support the same, and the learned trial Court, at the request of Herman Keck, plaintiff in error, instructed the jury to return a verdict of

not guilty thereon. (Original record, p. 206; printed, p. 111.) This will then leave for discussion the sufficiency of the first and second counts, the evidence, instructions, charge of court, etc.

First Count of Indictment—Questions as to.—The first count of the indictment was in the very language of the statute, and charged Herman Keck, plaintiff in error, with importing diamonds contrary to law, contrary to the provisions of Section 3082 of the Revised Statutes of the United States. (Original record, pp. 3–4; printed, p. 1.) It reads as follows:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmation, respectively do present that heretofore, to-wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, import and bring into the United States, and did assist in importing and bringing into the United States, to-wit: into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to-wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress, in such case made and provided, and against the peace and dignity of the United States of America."

On May 26, 1896, Herman Keck, plaintiff in error, moved the Court to quash said count in the indictment for various reasons, (original record, pp. 8–13; printed, pp. 3–4), and on the same day the Court overruled the motion (original record, p. 13; printed, p. 4), and this ruling was assigned for error as number one in the assignment in errors. (Original record, pp. 211–212; printed, p. 214.)

On the same day Herman Keck, plaintiff in error, demurred to said first count in the indictment, because the matters therein contained in manner and form as stated were not sufficient in law, and that he was not bound by the law of

the land to answer the same, and that for want of sufficiency of the first count of the indictment, he prayed judgment and dismissal (original record, pp. 14–15; printed, p. 5). The Court overruled said demurrer (original record, p. 17; printed, p. 6), which action of the Court Herman Keck, plaintiff in error, sets forth as his second assignment of error (original record, pp. 211–212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

At the close of all of the evidence, Herman Keck, plaintiff in error, requested the Court to return a verdict of not guilty on the first count in the indictment, because it did not state any crime, and that it should be entirely ignored. The Court refused to give this instruction (original record, p. 206; printed, p. 111). This action of the Court is assigned for error as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

Herman Keck, plaintiff in error, moved the Court in arrest of judgment, among other grounds, for the insufficiency of the first count of the indictment (original record, pp. 41–42; printed, p. 14), which motion the Court overruled (original record, p. 222; printed, p. 118). This ruling is assigned as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Second Count of Indictment — Questions as to.— The second count of the indictment charged Herman Keck, plaintiff in error, with smuggling diamonds contrary to the provisions of Section 2865 of the Revised Statutes of the United States (original record, pp. 4–6; printed, pp. 1–2). It reads as follows, to-wit:

"And the grand inquest, aforesaid, inquiring, as aforesaid, upon their respective oaths and affirmations, do further present

that afterward, to-wit, upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to-wit, into the port of Philadelphia, certain goods, wares, and merchandise, to-wit, five hundred and sixty-three diamonds, of great value, to wit, of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Herman Keck, plaintiff in error, moved the Court to quash this count of the indictment (original record, pp. 10–11; printed, p. 3–4) which motion the Court overruled (original record, p. 13; printed, p. 4); and this is assigned as number one in the assignment of errors (original record, pp. 211–212; printed, p. 114).

A demurrer was then interposed by Herman Keck, plaintiff in error, because said second count and the matters therein contained in manner and form as set forth were not sufficient in law, and that he was not bound by the law of the land to answer the same; and for want of sufficiency of the second count he prayed judgment and a dismissal (original record, p. 15; printed, p. 5), and the Court overruled said demurrer. (Original record, p. 17; printed, p. 6). The overruling of said demurrer is assigned for error as assignment number two in the assignment of errors (original record, p. 212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Herman Keck, plaintiff in error, moved in arrest of judgment because of the insufficiency of the second count in the indictment (original record, p. 36; printed, p. 12), and the Court overruled said motion in arrest of judgment (original record, p. 45; printed, p. 15). This was assigned for error as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Evidence Erroneously Admitted and Excluded.— There were several errors assigned for the wrongful admission and exclusion of evidence, as follows, to wit:

I.

The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz. (Original record, p. 59; printed, p. 22.)

As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhyland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Hammelrick came in with a person whom the witness indentified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the place Vert, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed

it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on place Vert, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state room and the paper in a card case in his pocket. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, Captain, that is a package of diamonds you have got, to be sent to Cincinnati, and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck, did not recall his name, and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck," and if Mr. Gallen had said "Johnson," witness would not have known the difference, and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony:

Q. "You did not identify him by his name at all, did you?"
A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhynland," was never on the "Rhynland," and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896.

Herman Keck's testimony is a direct and categorical denial of the testimony of Captain Frank Loesewitz.

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney and objected to by Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97–98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114).

II.

There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"
A. "Rough."
Q. "What do you do with the rough?"
(Objected to.)
Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."
(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as exception number nine in the assignment of errors (original record, pp. 215–216; printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed, p. 119).

III.

The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25), that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth, may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect. The piece of paper upon which Captain Loesewitz testified the stranger had written the name Van Reeth was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public print of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214–215; printed, p. 115).

This testimony was material because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he knew Captain Loesewitz (original record, p. 174; printed, p. 92).

General Charge of Court — Exception to.— The story told by Captain Frank Losewitz on the witness stand has been given substantially (this brief, pp. 7–8), and in reference to the same the Court charged the jury as follows (original record, p. 208; printed, 112), to-wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

Special Instructions — Refusal of.— Herman Keck, plaintiff in error, requested the Court to give certain special instructions, which were refused. They were as follows, to wit:

No. 1. The first request made was for a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and to which refusal an exception was taken (original record, p. 208; printed, p. 112), and was assigned as number ten in the

assignment of errors (original record, pp. 216–217; printed, p. 116).

No. 2. The second request was for a binding instruction to find the defendant not guilty on the first count of the indictment (original record, p. 204; printed, p. 110). This was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and duly assigned for error as assignment number eleven in the assignment of errors (original record, p. 217; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 3. The Court allowed the third request substantially when it allowed request No. 7, which finally disposed of and took the third count of the indictment out of the case (original record, p. 205; printed, p. 110; original record, p. 206; printed, p. 111).

No. 4. The fourth request was for a binding instruction that there was insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count, and that the jury should find him not guilty upon that count (original record, p. 205; printed, p. 110), which was disallowed by the Court and an exception taken (original record, p. 208; printed, p. 112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218; printed, p. 116), and in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 5. The Court was requested to give the following as a fifth instruction to the jury (original record, p. 205; printed, p. 110), to-wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that, although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received

said diamonds with the intention of not invoicing the same or putting the same on his manifest, and delivering same in America, without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which an exception was duly taken (original record, p. 208; printed, p. 112), and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 6. The Court was requested to give a sixth instruction, to ignore the first count, and this has been heretofore set forth (this brief, p. 5; lines 20–27) in reference to the indictment (original record, p. 206; printed, p. 111). The request was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and is set forth as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 7. The Court granted the seventh request, and thus disposed of the third count in the Bill of Indictment (original record, p. 206; printed, p. 111).

No. 8. The Court was requested to give an eighth instruction (original record, p. 206; printed, p. 111), which the Court refused to give, and an exception was noted (original record, p. 208; printed, p. 112), and appears as assignment number fifteen in the assignment of errors (original record, p. 220; printed, p. 117).

No. 9. The Court gave the ninth request (original record, p. 207; printed, p. 111.)

No. 10. Upon the matter of the burden and degree of proof, the Court, in its general charge to the jury, stated as follows (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, pp. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the 10th point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged, as testified to, by Captain Loesewitz, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Herman Keck, plaintiff in error, duly excepted to the answer of the learned Court, to the request for said instruction number ten (original record, p. 208; printed, p. 112), and the

ruling of the Court was duly assigned as error number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

Assignment of Errors.

(Original record, pp. 211–222; printed, pp. 114–118.)

Now comes the defendant, Herman Keck, in this action,—in connection with his petition for a writ of error—makes the following assignment of errors, which he avers occurred upon trial of the cause, to wit:

First.—The Court erred in overruling the motion of the defendant, Herman Keck, to quash each and all of the counts in the bill of *of* indictment; to the overruling of which motion the defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Second.—The Court erred in overruling the demurrer of the defendant in each and all of the counts of the bill of indictment; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the court.

Third.—The Court erred in overruling and denying the application of defendant, Herman Keck, for a *dedimus potestatem* to take evidence in pursuance of Section 866 of the Revised Statutes of the United States, which evidence was necessary to prevent a failure and delay of justice, and which evidence was to be obtained from witnesses in Antwerp, Belgium, and Amsterdam, Holland; to which ruling of the Court *and* overruling *of* said application defendant, Herman Keck, then and there excepted, and which exception was duly allowed by the Court.

Fourth.—The Court erred in sustaining the objection to and overruling the following questions asked by counsel for defendant, Herman Keck, of the *the* witness Frank Loesewitz, first produced by the Government, to wit:

Q. "Wasn't she (the Concha) seized for having on board smuggled goods? Weren't smuggled goods found right next to your cabin?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifth.—The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Did the captain give you a description of the man who gave the diamonds to him?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the Court.

Sixth.—The Court erred in overruling the objection made by the counsel for the defendant, Herman Keck, to the following questions asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "I want to ask you whether it was possible for him, Keck, to have seen that there was no address on that package at the time?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventh.—The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Was the package held by you at that time so that Keck could see it?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eighth.—The Court erred in sustaining the objection of the United States District Attorney to the following question put to the witness Constant Van Reeth, a witness for the defendant, Herman Keck, to wit:

Q. "Was his name mentioned in the papers at the time he left?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court; and thereupon defendant, Herman Keck, through Mr. Shields, of his counsel, offered to prove as follows, to wit:

"I offer to prove that at least one year and during a period of one year prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp and referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business."

And then and thereupon United States District Attorney objected to said offer of proof; which objection the Court sustained, and to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Ninth.—The Court erred in sustaining the objection of the District Attorney to the following question put by counsel for defendant, Herman Keck, on the direct examination of Franz Van Reeth:

Q. "What do you do with the rough?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court, and then and thereupon Mr. Shields, of counsel for defendant, Herman Keck, made the following offer of proof, to wit:

"My purpose is to show that they deal wholly in rough diamonds; that they can not make use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them, that they never had any of this kind of material in their place at all, so as to show that there was no motive on the part of these gentlemen to smuggle this stuff in."

Then and thereupon the District Attorney objected to said offer of proof; which objection the Court sustained, and then and thereupon defendant, Herman Keck, excepted; which exception was duly allowed by the Court.

Tenth.—The Court erred in making the charge to the jury in refusing to state to said jury and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on the bill of indictment."

To which refusal so to instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eleventh.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the first count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Twelfth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Thirteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamands mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering the same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fourteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to-wit:

"The jury are instructed that, as the first count in the bill of indictment insufficiently states any crime against the laws of the United States, said first count in the bill of indictment is to be entirely ignored by them and not considered."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the second count in the bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and as the section of the Statutes upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein and therefor, your verdict must be not guilty upon the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Sixteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by defendant, Herman Keck, to wit:

"The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted, which exception was then and there duly allowed by the Court, and the Court thereupon said it would give a modification of said instruction so requested, and defendant, Herman Keck, thereupon requested the Court to give said instructions as asked, which request the Court refused, and to which refusal and ruling of the

Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventeenth.—The Court erred in charging the jury, among other things, as follows, to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To which portion of said charge defendant, Herman Keck, then and there excepted while the jury was still at the bar of the Court.

Eighteenth.—The Court erred in overruling the motion of defendant, Herman Keck, to grant him a new trial; to which ruling of the Court, defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Nineteenth.—The Court erred in overruling the motion in arrest of judgment of defendant, Herman Keck; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

ARGUMENT.

I.

First Count of Indictment—Questions as to.

(1.) Where a statute which provides for the punishment of a crime does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective.

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective.

The first count in the indictment is as follows (original record, pp. 3-4; printed, p. 1) to wit:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, respectively do present that heretofore, to wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit: Into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

It is based upon the following section of the Revised Statutes of the United States, to wit:

"SECTION 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever on trial for a violation of this section, the defendant is shown to have, or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The count was confined to the first paragraph of said section, which is in the following language, to wit:

"SECTION 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise contrary to law," etc.

Said first count in no manner stated how the importation and bringing in, were contrary to law, or what law they were

contrary to, but merely alleged the legal conclusion, that they were contrary to law.

It is an elementary rule of criminal pleading, that the defendant should be apprised of the nature of the crime with which he is charged. If, in the case of a statutory crime, the legislative enactment sets forth the facts constituting the offence, it is sufficient if the indictment follow the language of the statute. But when the statute does not set forth the facts constituting the crime, it is not sufficient to repeat the language of the statute in the indictment, but the facts must be alleged. The first count of the indictment is absolutely barren of facts as to how and in what manner the alleged importation and bringing in were contrary to law, or as to what law they were contrary to.

Indictments under the same section (3082) similarly drawn were condemned in the cases of *United States vs. Kee Ho*, 33 Federal Reported, 333 (1887); *United States vs. Claflin*, 13 Blatchford, 178 (1875), and *United States vs. Thomas*, 4 Benedict, 370, 375; S. C. 2 Abbott, 114 (1870). The Supreme Court of the United States applied the same rule under another statute in the case of the *United States vs. Simmons*, 96 U. S. (6 Otto), 360 (1877). Mr. Justice Harlan in delivering the opinion of the Court said, among other things (at page 362), that:

"Where the offence is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., Sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

The same doctrine has been announced in many cases, and no more lucidly than in *State vs. Krueger*, 35 South-Western Reporter, 604, decided by the Supreme Court of Missouri, May 12, 1896. Judge Burgess, in the course of his opinion, goes over the whole ground.

Mr. Herman Keck, plaintiff in error, persistently objected to this count of the indictment by moving to quash (original record, pp. 8–10; printed, p. 3); demurring (original record, pp. 14–15; printed, p. 5); asking for a binding instruction to disregard it (original record, p. 201; printed, p. 109), and moving in arrest of judgment (original record, p. 39; printed, p. 14). The rulings of the Court in denying all of these are assigned as number one (original record, pp. 211–212; printed, p. 114); two (original record, p. 114, printed p. 212); fourteen (original record, pp. 219–220; printed, 117); and nineteen (original record, p. 222; printed, 118), in the assignment of errors. It is also set forth in the petition for a writ of error (original record, pp. 226–227; printed, pp. 119–120). We have heretofore enumerated them in our statement of the case (this brief, pp. 4–5).

II.

Second Count of Indictment—Questions as to.

(1.) Where a rate of duty is placed on many species of goods under a generic name, and one specie thereof is specifically named in the free list, such generic name applies to every specie of that class, except the one specified in the free-list. While punctuation may be disregarded, it is the duty of a Court to carry out the expressed and not the unexpressed intention of Congress. A Court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpreting a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen.

(1a.) The Act of August 27, 1894 (28 Stat. 534), paragraph 338, places a duty on precious stones, and paragraph 467 places diamonds on the free-list. An indictment charging the smuggling of diamonds states no crime.

(2.) An indictment should directly allege facts constituting a crime, and nothing should be left to conjecture or inference. Although the law defines a crime in generic terms, the indictment should specify species and descend to particulars. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment must so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion will not be sufficient.

(2a.) If paragraph 338 of the Act of Aug. 27, 1894 (28 Stat. 534), places a duty on some kinds of diamonds; and paragraph 467 places other kinds of diamonds on the free-list, an indictment for smuggling is not sufficient which merely charges the unlawful bringing in of "diamonds," but must specify a kind of diamonds other than those mentioned in the free-list. A mere legal conclusion in such indictment "that they were subject to duty" is not such an allegation, because the facts must be alleged, so an inspection of the record will show as a matter of law that they are subject to duty and thus amenable to the smuggling law.

The second count of the indictment is as follows (original record, pp. 4–6; printed, 1–2), to wit:

"And the grand inquest aforesaid, inquiring as aforesaid upon their respective oaths and affirmations, do further present that afterwards, towit: upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: into the port of Philadelphia, certain goods, wares and merchandise, to wit: five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid, were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with the intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case as made and provided, and against the peace and dignity of the United States of America."

This count of the indictment is based upon the following provisions of Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877, 19 United States Statutes at Large, Chapter 69, p. 247, to wit:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States any goods, wares, or merchandise, subject to duty by law, and which

should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom-house any false, forged or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the Court."

The insufficiency of this count of the indictment was persistently questioned by Mr. Herman Keck, plaintiff in error, who successively moved to quash the same (original record, pp. 10–11; printed, pp. 3–4), demurred thereto (original record, p. 15; printed, p. 5), moved the Court to instruct the jury to return a verdict of not guilty thereon (original record, p. 200; printed, p. 109), and moved the Court to arrest the judgment (original record, pp. 36, 40; printed, pp. 12, 14).

The Court overruled the motion to quash, the demurrer, the request for a binding instruction, and the motion in arrest of judgment, and the same are assigned as number one (original record, p. 211–212; printed, p. 114), two (original record, p. 212; printed, p. 114), twelve (original record, p. 217; printed, p. 116), and nineteen (original record, p. 222; printed, p. 118), in the assignment of errors. We have heretofore enumerated them in our statement of the case (this brief, pp. 5–7).

This count of the indictment is insufficient for one of two reasons. In the first place, diamonds are on the free list and are not subject to duty. In the second place, if not on the free list, some kinds of diamonds are undoubtedly on the free list, and the indictment should have specifically described diamonds which are subject to duty.

First. In the first place, diamonds are upon the free-list. The act of August 27, 1894 (28 U. S. Statutes at Large, Chapter 349, pp. 509–571), is entitled "An act to reduce taxation, to produce revenue for the Government, and for other purposes." The first section reads as follows, to wit:

"That on and after the first day of August, 1894. *unless otherwise specially provided for in this act*, there shall be levied, collected, and paid upon all articles imported from foreign countries, or withdrawn for consumption, and mentioned in the schedule herein contained, the rates of duty which are, *by the schedules and paragraphs respectively prescribed*, namely:"

Under "Schedule N — Sundries" — division entitled "Jewelry and Precious Stones," is found the following paragraph (p. 534), to wit:

"338. Precious stones of all kinds, cut, but not set, twenty-five percentum *ad valorem;* if set and not specially provided for in this act, including pearls set, thirty per centum *ad valorem;* imitations of precious stones, not exceeding an inch in dimensions, not set, ten per centum *ad valorem*. And on uncut precious stones of all kinds, ten per centum *ad valorem*."

If this were the only schedule and paragraph of the tariff law, it is clear that diamonds would fall under the generic term of "precious stones." But under the title of the "free list" is found the following schedule (p. 539), to wit:

"467. Diamonds; miners', glaciers', and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

This specific provision takes diamonds out of the general class of precious stones, and makes them non-dutiable. *Arthur vs. Rheims*, 96 U. S., 143 (1877); *Arthur vs. Lahey*, 96 U. S., 112 (1877). While the punctuation, in the use of a semicolon, may be disregarded, it is the duty of the Court to carry out the expressed and not the unexpressed intention of Congress. *United States vs. Schilling*, 11 U. S. App., 603 (1892). A Court can not inject into a statute a provision because it is the Court's belief that such provision accords with the settled policy of Congress. *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1 (1894). If we were to concede, for the sake of argument, that a case of doubt arose, such doubt must be resolved in favor of the citizen whose property is to be taxed. Taxation should always be imposed by direct, positive provisions

of law, and not by implication, construction, or conjecture. Every doubt must be resolved in favor of the citizen. *Henderson vs. The United States*, 66 Federal Rep., 53, 56 (1895); *Adams vs. Bancroft*, 3 Summer, 384, 387 (1838); *United States vs. Wigglesworth*, 2 Story, 369, 373–374 (1842); *Powers vs. Barney*, 5 Blachford, 202 (1863); *United States vs. Isham*, 17 Wallace, 496, 504 (1873); *Hartranft vs. Wiegmann*, 121 U. S., 609, (1896); *American Net and Twine Co. vs. Worthington*, 141 U. S., 468 (1891).

Second. If we be wrong in the contention that all diamonds are on the free-list, our position is that as some diamonds are on the free-list under paragraph 467 (page 539), and other diamonds dutiable under paragraph 338 (page 534), the indictment should have described dutiable diamonds. Paragraph 338 (page 534) specifies that precious stones of all kinds, cut but not set, should pay a duty of twenty-five per centum *ad valorem;* if set and not specially provided for in the act, including pearls set, thirty per centum *ad valorem;* and uncut precious stones of all kinds, ten per centum *ad valorem.* As paragraph 467 (page 539) specifies certain diamonds which are free and which come within the language of paragraph 338 (page 534), except that they are specially provided for, the indictment should, in describing the offense, have described the diamonds which are dutiable, because *non constat* the diamonds charged in the indictment might be non-dutiable. For all that appears in the indictment, the diamonds imported might be the diamonds specified in paragraph 467 (page 539), which are on the free list. It is not sufficient for the indictment to allege that they were subject to duty, because this is a conclusion, but the indictment should have specifically alleged that they were diamonds other than miners', glaciers', and engravers' diamonds, not set. The Court could then say that the diamonds were dutiable from an inspection of the record. This goes to the description of the offense.

Every act is presumed to be lawful, unless it be charged to be done under circumstances which render it criminal. For all that appears from the allegations of fact in the second count of the indictment, the diamonds were engravers', glaciers', and miners' diamonds, and are not to be presumed to be diamonds other than miners', glaciers', and engravers' diamonds. The indictment must show upon its face by allegations of fact that a crime was committed. The Court must be able to tell upon the reading of the indictment from the facts therein alleged that a crime was committed. For aught that appears in the indictment, the diamonds alleged to have been smuggled, may have been miners', glaciers', and engravers' diamonds. Defendant must be apprised by the allegations of fact in the indictment of the crime with which he is charged, and the charge ought not be left to conjecture. These rules have been illustrated in many decided cases; and no more forcibly than in the case of the *Commonwealth vs. Bean*, 11 Cushing (Mass.), 414. In this case the Revised Statutes of Massachusetts (Chapter 126, Section 42) punished any person who should maliciously or wantonly break the glass, or any part of it, in any building not his own. The indictment averred that the defendant maliciously and wantonly broke the glass, to wit: two panes of glass in a certain building not the property of the defendant. After a verdict of guilty the defendant moved in arrest of judgment, because the indictment did not allege that the glass broken was a part of the building, but only that it was in a building not his own. Mr. B. F. Butler appeared as counsel for the defendant and Mr. R. Choate, the Attorney-General, on behalf of the Commonwealth. Judge Metcalf, who delivered the opinion of the Court, said (at pp. 414–5), as follows:

"It is admitted by the counsel for the Commonwealth, that the section of the statute on which this indictment is framed, was intended to punish the malicious and wanton breaking of

glass which is part of a building. And it is argued by him that the words used in the indictment, being the same as those in the statute, must be held to have the same meaning. But this does not necessarily follow. The meaning of words in the statute may be and not unfrequently must be ascertained by examination of the context. In the present case, it is from the context that the words glass in a building are understood on all hands to mean glass which is part of a building. But the Court, in ascertaining the offense with which the defendant is charged, can not look beyond the words of the indictment itself. If those words do not sufficiently charge the offense which the statute was meant to punish, the indictment is fatally defective. 2 Hawk. c. 25, Sec. 111; *Commonwealth vs. Slack*, 19 Pick. 304; *Commonwealth vs. Clifford*, 8 Cush., 215; *Commonwealth vs. Stout*, 7 B. Monroe, 247. We are, therefore, of opinion that the indictment in this case will not sustain a judgment against the defendant. *For aught that the indictment shows, the glass, which he is charged with having maliciously and wantonly broken, may have been panes of glass which were not a part of any building.* Judgment arrested."

So likewise in *Commonwealth vs. Newburyport Bridge*, 9 Pick, 142 (1829). In this case the indictment charged the defendants with having neglected to provide a proper draw, and thereby prevented vessels and river craft from passing the bridge. The defendants moved in arrest of judgment because the indictment did not allege that any bridge had been built. The Court sustained this position in the following opinion (at p. 142), to wit:

"The answer to the first objection is, that the defendants completed the bridge and took toll; and if so we think they were bound to provide the means prescribed by the statute to enable vessels to pass with convenience through the draw. But we think the objection that the indictment does not allege that any bridge has been built is fatal. It may be, indeed, inferred by any common reader that there was a bridge; but no lawyer considering that inferences are not to be made in criminal cases would say it appears that a bridge had been built. There ought to have been an express allegation to that effect."

The indictment in the case of *United States vs. Cruikshank*, 92 U. S., 542 (1875) was for a violation of section six of the act of May 30, 1870, 16 U. S. Stat. at Large 140, and known as

the "Enforcement Act." The counts reviewed by the Court substantially charged the defendant with a conspiring to deprive certain citizens of African descent of their rights and privileges under the Constitution of the United States. The indictment omitted to state the facts, but merely charged the crime in the language of the statute, and did not specify any particular right of which the said citizens were deprived. The Court said it was unimportant that the indictment described a statutory offense in the language of the statute, but the question was whether any offense had been described at all; that there was no specification of any particular right, although the language of the indictment was broad enough to cover all.

Chief Justice Waite, in delivering the opinion of the Court, said (at pp. 557–8), as follows:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amendment VI. In *United States vs. Mills*, 7 Pet., 142, this was construed to mean, that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; and in *United States vs. Cook*, 17 Wall, 174, that every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary priciple of Criminal Pleading that *where the definition of an offense, whether it be at Common Law or by Statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species — it must descend to particulars.* 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first to furnish the accused with such a description of the charge against him, as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, *to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone.* A crime is made up of acts and intents; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

This language of Mr. Chief Justice Waite very happily illustrates the defect in the second count of the indictment.

"Diamonds," is a generic term by the classification made by the statute itself, and the indictment should have descended to particulars and stated upon its face the species of diamonds upon which duties are levied, to wit: diamonds other than miners', engravers', and glaciers' diamonds. The mere conclusion of law in this count of the indictment, that they were subject to duty, will not help the defective indictment, because the indictment should have stated the facts so that the Court might know, upon reading the indictment, whether they were subject to duty. This takes us to other and further very significant language of Mr. Chief Justice Waite (at page 558), as follows, to wit:

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the Court must be able to decide whether the property taken was such as was the subject of larcency."

So, in this case, the indictment must describe diamonds with that degree of particularity that the Court may decide, upon reading the indictment, whether the diamonds alleged to have been smuggled were subject to duty, because, as we have seen, there are some diamonds which are, and some which are not subject to duty.*

In the case of *State vs. Brown*, 3 Murphy (N. C.), 224, the defendant was charged with being a common Sabbath breaker and profaner of the Lord's Day, in that he sold and exposed to sale divers goods, wares, and spirituous liquors to negroes and others. The indictment did not allege that said negroes and others were not lame or weary travelers. Thereupon the Court arrested the judgment. Judge Henderson, who delivered the opinion of the Court, said (at page 225) as follows, to wit:

"The Court, upon an inspection of the record, must be able to perceive the alleged criminal act; for an indictment, as

* The Court is referred to an additional discussion of this question under division *third*, pages 70–71, this brief, wherein the *Dunbar Case* is distinguished.

was once well observed from this bench by Judge Lowrie, is a compound of law and fact. The latter part of the indictment charges that the defendant kept an open shop and sold divers goods, wares, and spirituous liquors to negroes and others on the Sabbath. This offense, as charged, is not punishable by indictment; *for if the act can be intended to be lawful it shall be so presumed unless it be charged to be done under circumstances whtch render it criminal*, and be so found by a jury. For aught that appears to the contrary, this sale might have been to the lame weary traveler, or to others to whom it was a merit to sell, instead of a crime; and nothing shall be intended against a defendant. And if this were the Sabbath breaking spoken of in the foregoing part of the indictment, taking the whole together, the defendant well might have done all charged against him and yet have committed no crime; and as this may have been the case, we are bound to presume it; at least not to presume to the contrary. The judgment must be arrested."

In *Hirn vs. State*, 1 Ohio St., 15 (1852), the rule is laid down, as follows, to wit:

"A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the matter of such exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it; but as the exception of the sale of liquor for medicinal and pharmaceutical purposes in the proviso in the first section of the law of 1851, to restrain the sale of liquor, points directly to the character of the offense, and becomes a material qualification in the statutory description of it, an indictment under this section is defective without the negative averment."

The foregoing quotation is from the syllabus, and is of a special force, because under the Rules of the Supreme Court of Ohio, the syllabus is prepared by the Judge, concurred in by his associates, and becomes the law of the case.

Judge Bartley, who delivered the opinion of the Court, stated (at pp. 24–25) as follows, to wit:

"It is requisite that every indictment should contain a substantial description of all the circumstances descriptive of the offense as defined in the statute, so as to bring the defendant precisely within it. And the only substantial reason for requiring this negative averment at all, is that,

without it, the description of the offense would not be complete. When, therefore, the matter of the proviso or exception in the statute, whether it be embraced within what has been termed, the enacting clause or not, *enters into and becomes a part of the description of the offense, or a material qualification of the language which defines or creates the offense*, the negative allegation in the indictment is requisite."

It is clear from the reason of the rule laid down by the authorities that the provisions of paragraph 467 of the free list goes to a description of the articles enumerated under paragraph 338, under jewelry and precious stones, and is a modification thereof.

We are here discussing the sufficiency of the indictment and the Rule of Criminal Pleading that the defendant should be specifically and definitely apprised of the facts with which he is charged as constituting a crime. It is immaterial what evidence may be introduced under a badly drawn indictment, because to allow that kind of pleading would fritter away the guarantee provided for in Article VI of the Amendments to the Constitution of the United States.

III.

Second Count of Indictment — No Proper Conviction Under.

(1.) The omission to get a Consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, and the arrival of the ship at Philadelphia, the demand for the diamonds at Philadelphia by a Revenue Officer who makes himself known as such, and the getting of the diamonds from the state-room and delivering the same to him does not constitute smuggling.

(2.) There can be no conviction for an attempt to smuggle, on an indictment charging smuggling.

(3.) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after over-acts of an attempt.

(3a.) Obtaining diamonds in Europe, with the intention of smuggling into America, omitting to get a Consular invoice, placing them in a state-room on a ship at Liverpool, omitting them from a ship's manifest, steering the ship into the port at Philadelphia, accompanied by an intention to smuggle, when nothing more is done, while they may constitute the distinctive offenses of omitting from the manifest, or importing contrary to law, do not amount to more than over-acts of preparation, and there is no over-act of an attempt to smuggle.

(3b.) When such diamonds remain in the state-room of the steamer, where they had been placed at Liverpool, and a Revenue Officer boards the ship at Phila-

delphia, and making himself known as such and demands the diamonds, and the Captain goes to the state-room, gets the diamonds and delivers them up to the officer, there is no overt act of an attempt to smuggle.

The second count of the indictment charged Mr. Herman Keck, plaintiff in error, with having smuggled and clandestinely introduced 563 diamonds without paying the duty thereon. This charge is based upon the following language of Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877, Chapter 69, 19 U. S. Statutes at Large, 247, to wit:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, which should have been invoiced, without paying or accounting for the duty, * * * * shall be deemed guilty of a misdemeanor."

The only witness on behalf of the United States was Captain Frank Loesewitz. As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native citizen and resident of Antwerp, Belgium; by occupation, a seafaring man and Captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium, Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick come with a person whom the witness identified in Court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Cafe Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there Mr. Van Hammelrick took a small package

from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman: he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati — either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the cafe a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, 1895, and put the package in his state room and the paper in a card case in his pocket. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27), to wit:

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got to be sent to Cincinnati, and if I did not deliver it I would be arrested.' After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That is all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treas-

ury agents came aboard before he had time to go upon the dock.

The testimony of Mr. Herman Keck, plaintiff in error, was a direct and categorical denial of the statements made by Captain Frank Loesewitz, as to all matters directly affecting Mr. Keck.

The Court in its charge said to the jury (original record, p. 208; printed, p. 112):

"*Gentlemen of the jury:* The several statutory provisions under which the defendant is indicted have been read to you and are doubtless understood. I need not undertake to explain them, or to dwell upon the law governing the case. It is sufficient to say in this respect, that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To the following part of the foregoing language, to wit:

"It is sufficient to say in this respect, that if the statements made here under oath, by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged,"

Mr. Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

Mr. Herman Keck requested the Court to give a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and an exception taken (original record, p. 208; printed, p. 112), and was assigned number ten in the assignment of errors (original record, pp. 216–217; printed, p. 116). The fourth

request was for a binding instruction to return a verdict of not guilty upon this count of the indictment (original record, p. 205; printed, p. 110). The Court disallowed the same and an exception was taken (original record, p. 208; printed, p. 112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218, printed, p. 116), and in the petition for a writ of error (original record, p. 226; printed, p. 119). Assignment number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116) will be more specifically noticed hereafter. Assignment number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117), refers to the answer of the Court to the request for special instruction number 10. The Court said (original record, p. 207; printed, p. 112) to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged *as testified to by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilt generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal and should be acquitted."

An exception was taken to this answer of the Court (original record, p. 208; printed, p. 112), and the ruling of the Court was assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

The rulings of the Court just detailed are erroneous for three reasons: 1. The facts do not constitute smuggling; 2. An attempt to smuggle is not alleged; 3. If an attempt to smuggle has been properly alleged, the facts do not make out a case of an attempt.

First. The facts do not constitute smuggling. The regular course pursued in shipping merchandise to America is as follows: The invoice is produced to the American Consul at the place where the merchandise is purchased, and the same is

duly certified to by the Consul. Act of June 10, 1890, 26 U. S. Statutes at Large, Chapter 407, page 131. An omission to get a consular invoice is not smuggling or an attempt to smuggle. The next step is to put the goods on board the ship. That does not constitute smuggling or an attempt to smuggle. The next step is for the Captain of the vessel to put the goods on his manifest. Revised Statutes United States, Section 2806. An omission so to do is not smuggling or an attempt to smuggle, but is a distinct offense of omitting goods from the manifest. Revised Statutes of the United States, Section 2809. The next step is to steam or sail the vessel from the port of departure to the port of entry. That is not smuggling or an attempt to smuggle. After the ship arrives the manifest must be produced. Revised Statutes United States, Sections 2811 and 2812. An omission to produce the manifest is not smuggling or an attempt to smuggle, but a distinct offense under Revised Statutes of the United States, Section 2814.

If goods be upon board the ship and without a consular invoice, and without appearing upon the manifest, it may be so from one of two reasons: 1. Because there is no intention to take them ashore at that port; or, 2. From a yet unexecuted intention of smuggling them ashore from the ship or clandestinely taking them ashore from the ship at the port of arrival. If a person has an intention to smuggle and the ship arrives at the port of entry with the goods on board, there may never be a crime of smuggling or attempting to smuggle. There may be either a sudden destruction of ship and cargo by storm, or an abandonment of the intention, before attempting to carry it into effect, or by a seizure of the goods before an attempt is made to carry the intention into effect. The principle governing each of these classes is the same, all being cases of unexecuted intention, or intention without the overt act, arising, in one case, from the act of God, in the

other from the act of repentance before attempting the wrong, and the last by the act of the Government.

The following is laid down in 1 Russell on Crimes (9th Edition), 172, to wit:

"Among the offenses against the revenue laws, that of smuggling is one of the principal. It consists in bringing on shore, or carrying from the shore goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited. An offense productive of various mischiefs to society."

In the case on trial, Captain Loesewitz testified that he put the diamonds in his state-room at Liverpool, where they remained until Mr. Gallen, a revenue officer, came aboard the ship at Philadelphia, made himself known to be a revenue officer, and demanded the diamonds, and they were thereupon delivered to Mr. Gallen (original record, p. 66; printed, p. 27). It therefore follows that the diamonds were never smuggled. Such being the case, it was clearly erroneous for the Court to charge the jury that if they believed the story of Captain Loesewitz they must find the defendant guilty; to refuse the request to find the defendant not guilty; to refuse the request to find the defendant not guilty on the second count in the indictment; to say to the jury in response to a request for a special instruction, that they should return a verdict of guilty, generally, if they were convinced that the defendant was guilty of smuggling as charged, as testified to by Captain Loesewitz.

Second. An attempt at smuggling is not alleged. If there be a statute which will punish an attempt to smuggle, an attempt has not been alleged. State vs. Colvin, 90 N. C., 717 (1884). It is repugnant to charge one with doing an act, and at the same time to say that he attempted to do it. For some offenses attempts are made substantive offenses, such as attempts to commit the crime of murder or manslaughter under Section 5342 of the Revised Statutes

of the United States. In some States statutes have been passed permitting a conviction for an attempt under an indictment for doing the act. But there are no Federal Statutes of that kind, and none in reference to the crime of smuggling.

Third. If an attempt at smuggling has been properly alleged, the facts do not make out a case of an attempt. If, for the sake of argument, we take the strongest possible view of the testimony of Captain Frank Loesewitz, there was an unexecuted intention to make an attempt to smuggle; or, at most, a preparation accompanied with an intention to make an attempt to smuggle. The acts of preparation were, first an omission of a Consular invoice which would be one step; putting the diamonds on ship-board in the state-room at Liverpool, which would be the second step; omitting the diamonds from the manifest, which would be the third step; steaming the vessel from the port of Liverpool to the port of Philadelphia, which would be the fourth step in the preparation; omitting to deliver a manifest containing the diamonds, which would be a fifth step in the preparation. But here the overt acts cease, and all of the overt acts were but preparatory. Nothing further was done, and the goods remained in the state-room on ship-board, where they were first placed in Liverpool, until Mr. Gallen, a revenue officer, who made himself known as such, demanded the goods in his official capacity, and they were delivered up to him in that capacity. Merely because there was the crime of failing to get a Consular invoice, or the offense of omitting goods from the manifest, or the offense of failing to deliver a manifest with the goods thereon, and because said acts constituted an unlawful importation under the provisions of Section 3082 of the Revised Statutes of the United States, and merely because in this case there could be no conviction of importing contrary to law, because the first count of the indictment was badly drawn, would not authorize a conviction

for an attempt to smuggle, when, by the over-zeal of the Treasury official, no overt act toward landing the diamonds was done.

There is a wide distinction between an attempt and an intent. There is a wider distinction between acts constituting an attempt and acts constituting preparation. The antimoiety act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, defines smuggling for the purposes of that act in the following language, to wit:

"That for the purposes of this act smuggling shall be construed to mean *the act* with intent to defraud of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, throught he custom-house, or submitting them to the officers of the revenue, for examination."

Even if we adopt this as a legislative definition of smuggling and of an attempt to smuggle, the evidence fails to make out a case. It appears that Judge Benedict, in the case of the *United States vs. Claflin*, 13 Blatchford, 178 (1875), adopted it on a definition. We have already shown (this brief, pp.39-40) that at most there was a me repreparation to make an attempt to smuggle without any attempt; an unexecuted intention, and no overt act done beyond the acts of preparation. An attempt is an interrupted act done after the acts of preparation.

The Court's special attention was called to this matter by request number five (originial record, p. 205; printed, pp. 110-111) in the following language, to-wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not

invoicing the same, or putting the same on his manifest and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which ruling an exception was taken (original record, p. 208; printed, p. 112) and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

The Court should have given this special instruction, and also granted the request for a binding instruction to find the defendant not guilty; and it was clearly error for the Court to charge the jury, that if they believed the statements made by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing to America, that the jury should find the defendant guilty.

There was no interrupted overt act of bringing in of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no interrupted overt act of an introduction of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no moving of the diamonds from said state-room toward the shore, interrupted before reaching the shore. All preparations had been completed, either to bring them in lawfully by passing them through the custom house, or submitting them to the officers of the revenue for examination, on the one hand; or, of attempting to pass them from the state-room to the shore without passing them through the custom house, or submit-

ting them to the officers of the revenue for examination, on the other hand. Anti-moiety act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, Section 4, paragraph 2. No overt act had yet been done, no matter how many acts of preparation or what the secret intention.

If, after the steamer Rhynland arrived, a stroke of lightning had sunk the ship, it is clear that up to that time there was no smuggling or an attempt to smuggle, although an offense of omitting to have a Consular invoice, or omitting to put the goods on the manifest, may have been committed (this brief, pp 39–40).

If, after the ship arrived, Captain Loesewitz had changed his mind and concluded either to pass the same through the custom-house, or submit them to the officers of the revenue, or returned them to Europe, it can hardly be claimed that there was smuggling, or an attempt to smuggle. Or if, after the ship had arrived, an officer of the Government should have demanded an examination, and Captain Loesewitz, knowing the officer to be such, should thereupon submit them to the officer in his official capacity, it is clear that there had been no smuggling, and as yet no overt act of an attempt to smuggle. Or, as in this case, the diamonds were lying in the cabin just as they had been put at the port of Liverpool, and no move made toward taking them from the state-room ashore, there could not be smuggling or an attempt to smuggle, as there was no overt act toward bringing in or introducing, interrupted while being carried out. On the contrary, upon a revenue officer demanding the diamonds, in his official capacity, the Captain went to the state-room, got the diamonds, and they were submitted to the revenue officer for his examination (original record, p. 66; printed, p. 27). What was done comes within the very language of paragraph 2, section 4, of the Anti-moiety Act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, as to acts which do not constitute smuggling or attempting to smuggle. By the

language of the Anti-moiety act, *nonaction* is not an offense, but *an act*. Nor is it to be forgotten that Captain Frank Loesewitz testified (original record, pp. 81–82; printed, pp. 36–37), that he had been in the habit of bringing over small packages in the same way he brought the package in the case on trial, and after the vessel had been docked he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock.

These principles have been announced and applied in numerous cases. In the case of *People vs. Murray*, 14 Cal. 159, Chief Justice Field (at p. 159) laid down the following proposition:

"Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

So in the case on trial it is clear that all the means and measures for the commission of the offense were completed, and preparations made, but there was no direct movement toward the commission after the preparations were complete.

The case of *Mulligan vs. People*, 5 Parker's Criminal Reports, 105, decided by the General Term of the Supreme Court of New York in February, 1861 (Clerke, Sutherland, and Allen, Justices), is an interesting one as illustrating the difference between acts of preparation and overt acts of attempt after the acts of preparation. It appears that William Mulligan got into a row in a gambling house. Upon being threatened with eviction, drew and pointed an uncocked Colt's revolver at the officer and threatened to shoot. There was no evidence of an attempt to cock the pistol or to pull the trigger. He was prosecuted under the statute which punished every person who should be convicted of shooting at another, or attempting to discharge any kind of fire-arms,

with intent to kill, maim, etc. (page 109). At the close of the evidence the Court was requested to charge the jury that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon. The Court refused the request, and the ruling of the Court was assigned for error. Justice Allen, who delivered the opinion of the Court, said (page 109) that:

"The question presented is, whether a conviction can be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge of shooting than to raise and point the pistol, uncocked, at the party threatened. There was no evidence of an attempt to cock the pistol or to pull the trigger, and the jury would have been warranted in finding that the prisoner merely raised the pistol and pointed it at the officer, making the qualified threat before stated. The instruction was properly asked for upon the evidence. *The threat constituted no part of the attempt to discharge the pistol, and was only evidence of the intention of the prisoner.*"

The Court further stated (page 111):

"It is not an attempt to discharge a loaded gun or pistol to put oneself in a situation in connection with the gun or pistol that it may be discharged. A mere getting it in readiness to discharge is not an attempt to discharge it. Upon the trial, an assault with intent to kill was confounded with the specific, statutory, and entirely different offense charged, an attempt to discharge a loaded pistol with the like intent. The act, the attempt to commit which was made an offense, was the discharge of fire-arms. No matter what other offense was committed against the laws, or the person of the officer, if this offense was not committed, the prisoner was wrongfully convicted. It is far from certain that any offense was committed by the prisoner, but of that we are not the judges. We are only to decide upon the present conviction."

The Court again said (at p. 112):

"An attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design (Bouvier's Law Dic.). Loading a pistol would be a preparation to shoot, but not an attempt to discharge. So, to get possession of a pistol, to take it from the pocket, and to point it would be a preparation to discharge it, but not an attempt to discharge it. It may not always be easy to deter-

mine where the line is which separates a preparatiou to perform a given act from an attempt to perform the act. But the act, which is characterized as an attempt, must be proximate to the principal thing to be accomplished, a means to the end, and the pointing of a pistol uncocked is not an attempt t. discharge it, punishable under the statute. Fire-arms are usually discharged by drawing a trigger, but they may be discharged in any way by which the powder can be ignited and made to explode, and the attempts to discharge may be as diversified as the means of discharge are various, but can only be by some act, which, carried out and perfected, will result in a discharge."

In the case at bar the question is whether Mr. Herman Keck, plaintiff in error, has done an overt act by attempting to smuggle in violation of Section 2865 of the Revised Statutes of the United States, and not whether he did or attempted to violate any other provision of law. Chief Justice Field (at p. 159), in *People vs. Murray*, 14 Cal., 159 (1859).

In *Kelly vs. Commonwealth*, 1 Grant Cases (S. C. Pa.) 484, the defendant was indicted for killing in an attempt to commit rape. The evidence disclosed the killing of a man, and no overt act of force toward the commission of a criminal assault upon his daughter. The Court held that the facts did not make a case for an attempt to commit rape, reversed the conviction because "acts are necessary to constitute an attempt; and an attempt to commit a rape is an ineffectual offer by force to have carnal connection."

It is laid down in *State vs. Wilson*, 30 Conn. 500 (1862), that the overt act charged as constituting the attempt must be such as is in itself adapted to produce the effect intended. In the case at bar such overt act would have consisted in after having gone to the state-room on the steamer Rhynland, where the diamonds had been lying ever since put there at Liverpool, moving them with the intention of not passing them through the custom-house or submitting them to the revenue officers for examination, would have constituted an overt act of attempt. But no such overt act was done or attempted to be done, and therefore there was no attempt.

IV.

Evidence Erroneously Admitted.

(1.) A person sworn as a witness should be permitted to state only facts to which he was a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declarations made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible.

(1a.) When a sea captain claims that a stranger to him in Europe induced him to smuggle diamonds into America, and said sea captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the captain arrested by a revenue officer, and a day after the seizure the captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is incompetent, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy.

(2.) Hearsay evidence is not competent to corroborate the statements of a witness made upon the stand.

(2a.) A court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe, but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing court should correct, although not excepted to, or assigned for error.

The Court overruled an objection of Mr. Herman Keck, plaintiff in error, to a question put by the District Attorney to the witness, John C. Gallen (original record, pp. 97–98; printed, p. 46). The error arose as follows:

The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz. (Original record, p. 59; printed, p. 22.)

As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhyland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of busi-

ness of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Hammelrick came in with a person whom the witness indentified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish (original record, p. 61; printed, p. 24). While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state-room and the paper in a card case in his pocket. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, 'yes.' I thought

those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got, to be sent to Cincinnati,' and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck, did not recall his name, and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck," and if Mr. Gallen had said "Johnson," witness would not have known the difference (original record, p. 83; printed, p. 37), and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony (original record, p. 83; printed, p. 37):

Q. "You did not identify him by his name at all, did you?"

A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhynland," was never on the "Rhynland," and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896 (original record, p. 98; printed, p. 46).

Herman Keck's testimony is a direct and categorical denial

of the testimony of Captain Frank Loesewitz (original record, pp. 179–197; printed, 95–107).

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney and objected to by Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97–98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes, sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114); and has already been set forth in our statement of the case (brief, pp. 7–10).

This ruling raises the question, whether the witness, Mr. John C. Gallen, should have been permitted to detail upon the witness stand delarations made by Captain Frank Loesewitz, one day after the seizure of the diamonds and the arrest of said Captain Loesewitz. It comes within the hearsay rule, and within none of the exceptions thereto. It was proper enough when Captain Loesewitz was upon the witness stand, claiming to be the percipient witness to an alleged transaction in the Cafe Alsacienne, to give a description of the person with whom he claimed to have had the transaction. It would have been competent for a person knowing Mr. Herman Keck, plaintiff in error, to state from the witness stand Mr. Keck's appearance, as a percipient witness thereto. In the instance first mentioned Mr. Gallen's testimony would be

but a repetition of what Captain Loesewitz said to the witness, and the witness Gallen was a mere percipient witness to the conversation, and not to a description of Mr. Keck. The statement by Captain Loesewitz of such description to witness Gallen, and detailed by Mr. Gallen on the witness stand, would be hearsay evidence. Best's Principles of Evidence (Chamberlayne's Ed., 1883), Section 492, Note (1). Such hearsay was inadmissible, and there is no rule or principle of the law admitting it. Mr. Herman Keck, plaintiff in error, positively denied meeting Captain Frank Loesewitz. It would be a strange rule to allow Captain Loesewitz, after testifying upon the witness stand to a description of Mr. Herman Keck, to claim to corroborate that statement as truth by showing by the witness Gallen that he had told the same story to others; especially as the story told by Captain Loesewitz, both on and off the stand, was claimed by Mr. Herman Keck to be a falsehood. If that testimony be admissible, it would have been competent for Mr. Herman Keck, plaintiff in error, to have called a hundred persons to testify that he had stated to them that he did not know Captain Loesewitz, for the purpose of corroborating his testimony upon the witness stand, that he had not met Captain Loesewitz. Nor is the objection removed by the fact that the learned District Attorney put a leading question. This evidence is especially prejudicial, as Captain Loesewitz testified that he did not know Mr. Keck by name; had no recollection of the name "Keck," and if Revenue Officer Gallen had said "Johnson," the witness would not have known the difference; that all the witness knew was the man's face, and that he could not identify him by his name (original record, p. 83; printed, p. 37). A name being but one means of identification, it would have been clearly incompetent to have some one detail from the witness stand a conversation had with Captain Loesewitz one day after the seizure of the diamonds, wherein Captain Loesewitz described Mr. Keck by name; it was equally incompetent if described him in some other way.

A well-recognized exception to the rule against hearsay is, that *while a conspiracy exists*, the declaration of one co-conspirator in furtherance of the common design are admissible against his associates. 2 Wharton Evidence (3d Ed., Sec. 1205). But a narrative after the conspiracy is terminated, is inadmissible. 2 Warton Evidence (3d Ed., Sec. 1206). If there were a conspiracy between Captain Frank Loesewitz and Mr. Herman Keck, that conspiracy had been terminated by the seizure of the diamonds by Revenue Agent Gallen. A full day elapsed after the seizure. Before the declaration offered in evidence was made.

The rule governing the reversal of cases for the wrongful admission of evidence is admirably stated in the case of *Boston and Albany Railroad Company vs. O'Reilly*, 158 U. S., 334 (1894), by Mr. Justice Shiras (at p. 337), as follows:

"If the record disclosed no other error, the admission of this evidence might have been passed by as immaterial. Still, it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an Appellate Court will not disturb a judgment for an immaterial error, *yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting. Deery vs. Gray*, 5 Wall, 795, 807; *Gilmer vs. Higley*, 110 U. S., 47."

This error was especially material and prejudicial, because there was oath against oath, and anything, no matter how slight, may have wrongly turned the scales against the defendant.

The Court, having once made its ruling that testimony of this character was competent, it was hardly the province of, or becoming to, an advocate, to keep on objecting every time the District Attorney offered similarly incompetent testimony. An advocate has a duty to perform, and nothing so seriously prejudices a case before a jury as constant unavailing objections and noting exceptions. An objection was made by Mr. Herman Keck, plaintiff in error, the objection

overruled, and an exception taken. The Court having opened up this sluice-way, the learned District Attorney poured in upon the case great volumes of similarly incompetent testimony. This evidence is clearly prejudicial, and it does not appear beyond a doubt that it was not and could not have been prejudicial to Mr. Herman Keck, plaintiff in error.

This very incompetent and illegal testimony was the chief reliance of the District Attorney in his argument for corroboration; and it pierced the defendant like a dagger when, after allowing this kind of hearsay evidence to be admitted, and the District Attorney had claimed in his argument that it corroborated the witness Frank Loesewitz, to charge the jury (original record, p. 209; printed, p. 112), as follows:

"The Government claims, however, that the Captain is corroborated in important particulars, and in such manner that it is not only safe to believe him, but that belief can not be avoided. The points of corroboration and the matters on which they depend have been referred to and dwelt upon by the District Attorney very fully, and I need not further allude to them."

And for the Court to make this incompetent and illegal hearsay doubly prejudicial it had but to add (original record, p. 208; printed, p. 112) that:

"It is sufficient to say in this respect that if the statements made here, under oath, by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here, are true, the defendant is guilty of the offense charged."

If it be said that the part of the charge first here quoted was not excepted to and assigned for error, yet it is that kind of a plain error, vital to the defendant, which this Court always corrects. *Wiborg vs. United States*, 163 U. S., 632, 633 (1896).

That part of the charge, secondly quoted, was duly excepted to (original record, pp. 209–210; printed, p. 113) and assigned for error as number seventeen in the assignment of errors

(original record, p. 222; printed, p. 118). The Court reiterated this error in its answer to request number ten for a special instruction (original record, p. 207; printed, p. 112), which answer was duly excepted to (original record, p. 208; printed, p. 112) and assigned for error as number sixteen in the assignment of errors (original record, p. 221; printed, pp. 117–118).

V.

Evidence Erroneously Excluded.

(1.) In every case the following are pertinent hypothesis: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of the evidence of the witness. It is competent to introduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury.

(1a.) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or thirty minutes; that the conversation was carried on in Flemish by a friend of the Captain; that the stranger wrote an address on a piece of paper, and the only thing he said was, "by Adams Express," which was in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds, could not make use of the cut diamonds in his business, he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypothesis that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to pertinent hypotheses, the Court must admit it; its weight is for the jury.

(1b.) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 West Fourth St., Cincinnati, and handed it to him; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia, February 11, 1896, was arrested and the diamonds seized. On his arrest, and thereafter, he claimed, to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypotheses that the witness, Captain

Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said times; and ought to have been admitted, and it was error for the Court to exclude it.

We have set forth in our statement of the case (brief, pp. 10–12) two instances of the wrongful exclusion of evidence. They will be presented separately:

First. The Court sustained an objection to a question (original record, p. 175; printed, p. 93) put to the witness, Mr. Franz Van Reeth, and the error arose as follows:

There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"
A. "Rough."
Q. "What do you do with the rough?"
(Objected to.)
Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."
(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as number nine in the assignment of errors (original record, pp. 215–216;

printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed, p. 119). It has already been set forth in our statement of the case (brief, p. 10).

This testimony was clearly competent as rendering probable the testimony of Mr. Herman Keck, and improbable the transaction claimed by Captain Frank Loesewitz to have taken place.

The rules of relevancy and their application are plainly shown by the text writers, and in many adjudged cases.

In Thayer's Cases on Evidence, 2, the rule is thus laid down:

"Observe at this point one or two fundamental conceptions. There is one precept to be mentioned, which is not so much a rule of evidence as a pre-supposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical system: viz., nothing, which is not supposed to be relevant, *i. e.*, logically probative, shall be received. How are we to know what these things are? Not by any rule of the law. The law furnishes no test of relevancy. For this, it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known.

"And there is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is largely probative is not, like the former precept, a necessary presupposition in a rational system of evidence; and, accordingly, there are very many exceptions to it. But yet, in order to a clear conception of the law, it is important to notice this also as being a fundamental proposition."

And again (p. 3):

"The law of evidence is the creature of experience, rather than logic, and we can not escape the necessity of tracing that experience. Founded, as being a rational system, upon the laws that govern human thought, and so presupposing and conforming to them, it yet recognizes another influence that must, at every moment, be taken into account; for it is

this which has brought it into being, as it is the absence of this which alone accounts for the non-existence of these rules in all other countries, ancient or modern. For, as I have already indicated, the main errand of the law of evidence is to determine, not so much what is admissible in proof, as what is inadmissible. Assuming, as it does, that, in general, what is evidential is receivable, it is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of inadmissible evidence. Admissibility is determined, first, by relevancy—an affair of logic and not of law; second, but only indirectly, by the law of evidence which, in strictness, only declares whether matter, which is logically probative, is excluded."

The same principle was announced in a controversy involving identity by Judge Minshall in the case of *Bell vs. Brewster*, 44 Ohio St., 690 (1887), in somewhat different language, when he said (at p. 699) that:

"Judicial proof is not a matter of mere arbitrary rule. Its principles are drawn from the experience and observation of men, and should be applied as they are by men in general. Every lawyer and judge of experience will confirm what is said by Mr. Phillips in his work on evidence: 'It may be laid down as a first principle that exclusion is generally an evil and admission generally safe and wise.' To which he adds: 'It is certain the administration of justice in our courts has suffered, not from too free admission of evidence, but from too rigid exclusion.' 2 Phil. Ev. (Edwards Ed.) 628."

In 1 Wharton on Evidence (3d Ed.), Sec. 20, the rule is thus admirably stated:

"Relevancy is that which conduces to the proof of a pertinent hypothesis: a pertinent hypothesis, being one which, if sustained, would logically influence the issue. A will, for instance, is contested, and several hypotheses are presented, on any one of which, if proved, the instrument would be invalid. The signature, for instance, may have been forged, or the testator insane, or he may have been fraudulently induced to execute a paper different from that which he had in view. To each of these hypotheses, a series of counter hypotheses is conceivable. If the hypothesis set up for the defense is forgery, then all facts which are conditions of forgery are relevant. A party, for instance, sued on a bill sets up forgery;

to meet this hypothesis, it is admissible for plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money. If the hypothesis set up for the defense is fraud, then all facts which are conditions of fraud are relevant. Or, to take another illustration: A prairie is fired, it is said, by a passing locomotive; the hypothesis of the plaintiff is that the firing was by negligence, and for the plaintiff all the conditions of negligence are relevant. The defense sets up *casus*, or contributory negligence; and then, on the part of the defense, it is relevant to prove the conditions of either of the latter hypotheses."

And again (at Section 21):

"Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable."

The learned writer illustrates his main proposition (in Section 23) as to pertinent hypothesis as to proof of the author of Junius; and (in Section 24) as to identify in the famous Tichborne case.

Sir James Fitzjames Stephen, in his Digest of the Law of Evidence, Part 1, Chapter 2, Article 7, lays down the following rule:

"When there is a question whether any act was done by any person, the following facts are deemed to be revelant, that is to say:
"Any fact which supplies *a motive* for such an act, or which constitutes preparation for it."

He illustrates this rule as follows:

"The question is, whether A. murdered B. The facts that, at the instigation of A., B. murdered C. twenty five years before B.'s murder and that A. at or before that time used expressions showing malice against C. are deemed to be relevant as showing *a motive* on A.'s part to murder B."

The author quotes *R. vs. Clewes*, 4 C. & P., 221. The American editor (Mr. William Reynolds) cites *McKee vs. People*, 36 N. Y., 113; *Kolb vs. Whiteley*, 3 G. & J., 188, 195; *Garber vs. State*, 4 Caldw. (Tenn.), 161, 165.

In Wharton on Criminal Evidence (9th Ed.), Section 17, the rule is thus stated:

"Suppose the question to be, *whether it is more probable* that a given abstract man (the witness) should have committed one crime, that of perjury, than that another given abstract man (the defendant) should have committed another crime, that of murder; here, if we divest the issue of all circumstances on either side, *there is simply a balance of improbabilities* in weighing, which the mind must incline, if it incline at all, to the acquittal of the darker crime."

And again (Section 18):

"Perjury, indeed, is never to be presumed; but we can not shut our eyes to the fact that convictions have sometimes been based upon perjured testimony; and, though the probability of perjury may be but one to a hundred, yet this is only another way of saying that it is probable to a very high degree, but not certain, that there is no perjury in the testimony brought before us in any given case. It is true that *there may be forgery of facts as well as falsification by witnesses;* and it is true, also, that with the exception of such objects as can be brought into court on trial, the adjudicating tribunal must become cognizant of indicatory facts through witnesses who may be as much tempted to perjure themselves in giving this kind of testimony as in giving other kinds of testimony. But it can not be denied that perjury, in respect to that of which a witness says he was the only observer, is more easy than perjury in respect to extrinsic facts open to common observation, and a *forti ori* more easy than the forgery of such facts. Perjury of the first class is skillful in eluding detection; is self-contained and self-verifying; it can be consummated without observation and without machinery; it is thus easily concocted and not easily exposed. On the other hand, extrinsic facts can not be forged with attracting more or less attention, nor testified to without that possibility of exposure inherent in all fabrications of matters extrinsic. False direct testimony, also, hangs ordinarily on a single link, and if that link is sufficiently strong the case succeeds. But is of the essence of what is called circumstantial evidence, *i. e.*, evidence dependent on the collection of numerous self-supporting facts — that if one of these facts should turn out to be forged, the taint affects the whole system. *The probability of detection of falsification is, therefore, in proportion to the number of issues presented.*"

And again (Section 21):

"The evidence on trial consisting, therefore, of a series of facts more or less closely connected, argument consists in the application to these facts of particular hypothesis; and in criminal issues, if there be no probable hypothesis of guilt, consistent, beyond reasonable doubt, with the facts of the case, the defendant must be acquitted. But this is not the only use of hypothesis. *It is only by appealing to hypothesis that questions of relevancy * * * can be determined. * * * Hypothesis, thus, is the basis on which admissibility of evidence must rest, as it is the basis on which must rest either acquittal or conviction.*"

And again (Section 23):

"*Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue.* A person is found dead, for instance, with marks of violence on his body, and at once a series of hypotheses are tried in turn, as keys to a lock, to see if they will disclose the secret of the death. Were the wounds homicidal or suicidal? * * * If a person is on trial for the homicide, then against him are admissible all facts that sustain any hypothesis which implies his guilt. When it is his turn to develop his defense, then any facts are admissible that would sustain the hypothesis of his innocence."

And again (Section 24):

"Relevancy is therefore to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts, that go either to sustain or impeach a hypothesis logically pertinent are admissible. But no fact is relevant which does not make more or less *probable* such a hypothesis."

In *Wiggins vs. People, etc., in Utah*, 93 U. S. (1876), 465, the facts were as follows: Mr. Wiggins was indicted for killing John Kramer (p. 466); Dobson, called by the State, was the only percipient witness (excepting the defendant Wiggins) to the killing (p. 467); Dobson was unable to tell who fired the first shot; Wiggins was convicted. On his trial he offered to prove by witness Haslop (p. 466) that prior to and on the night of the killing, the deceased, John Kramer, made a threat that he would kill the defendant, Wiggins, before he went to bed. Defendant Wiggins could not and did not attempt to show that the threat had been communicated to him. On the

objection of the District Attorney, the Court excluded this evidence, and an exception was taken. Mr. Wiggins prosecuted error and the Supreme Court of the United States held that the evidence was competent, ought to have been admitted, that the trial court erred in excluding it, and set aside the conviction and reversed the judgment.

Mr. Justice Miller, who delivered the opinion of the Court, said (p. 470) that:

"Now, when, under all these circumstances, the witness, and the only witness who was present at the encounter, swears that he can not tell where the first shot came from, though he knows that defendant only fired three, it must be very apparent that if the person to whom the deceased exhibited that pistol a few minutes before the shooting had been permitted to tell the jury that deceased then said, 'he would kill defendant before he went to bed that night,' it would have tended strongly to show where the first shot came from, and how that pistol with one chamber emptied came to be found on the ground. *This testimony might*, in a state of mind produced on the jury by the other evidence we have considered, *have turned the scale in favor of defendant.* At all events, we are of opinion that in that condition of things it was relevant to the issue and should have been admitted. Judgment reversed, with directions to set aside the verdict and grant a new trial."

The rules have been illustrated by many cases. Thus in *Allison vs. Horning*, 22 Ohio St., 138 (1871), the Court admitted evidence of the value of work at the time a contract was made therefor, as tending to show what the *agreed* price was, where the testimony was conflicting as to the agreed price. Judge Day, who delivered the opinion of the Court, said (at p. 142) that:

"The only point of difference between the parties was the *price* for which it was *agreed* the work should be done. The evidence was admitted for no other purpose than to enable the jury to decide which of the prices claimed by the respective parties was the true price agreed upon. * * * * It was of some value as tending to show the *improbability* of the claim of the defendant."

In *Tompkins vs. Starr*, 41 Ohio St., 305 (1884), the syllabus is as follows:

"Where T. claimed and had offered evidence to show that S., her brother, had agreed to furnish her a home as long as she lived, if she would act as his housekeeper, and S. claimed that by the arrangement between them T. was to be his housekeeper only so long as they could agree, or as long as they should get along together. *Held:* That it was competent for S. as tending to support his claim to prove that T. was a person of peevish, nervous, and disagreeable temper, and that none of her relatives who had tried to live with her could do so; and that these facts were known to S. when the arrangement to live together was made."

Judge McCauley, who delivered the opinion of the Court, said (p. 306) that:

"If the plaintiff was of such peevish and disagreeable temper that none of her relatives could live with her, and this was known to the defendant when the arrangement to keep house was made, these facts would strengthen the *probability* that the arrangement was temporary, as claimed by the defendant, rather than for life, as claimed by the plaintiff."

In *Dyer vs. Isham*, 4 Ohio Circuit Court Reports, 429 (1890), a debt had been discharged by bankruptcy proceedings. The plaintiff testified that after the bar defendant had acknowledged and promised to pay the debt, the defendant on the witness stand denied making such promise. The plaintiff thereupon attempted to prove that at the time of making the alleged promise the defendant was worth $25,000 over and above his liabilities *as rendering probable* the testimony of the plaintiff that the defendant had promised to pay the debt after the bar. The trial court excluded the evidence, and this was assigned for error. The Circuit Court reversed the judgment, holding the testimony competent for the purposes for which it was offered. The opinion was delivered by Judge James M. Smith, who is regarded, by the bench and bar of Ohio, as one of the ablest members of her judiciary. He said (pp. 433-434) that:

"We are of the opinion that evidence of the financial condition of Mr. Isham at the time in question was relevant—that the legitimate tendency of it, in connection with the other

facts proved in the case, would have been to show *that the proposition as to the promise which was in issue was more or less probable.* It would seem to us that a man in independent circumstances, or of large means, whose friend had paid debts for him from which he was legally discharged, but which he had declared should be paid in full, would be much more likely to bind himself by a promise to pay them, than if he were in reduced circumstances, and had barely sufficient to maintain himself or family. Of course, such evidence of itself would be of little weight, for we recognize the fact that a man of great wealth, while admitting the justice of such claims upon him, might have declined under the circumstances named to bind himself to the payment of these barred debts. *But we think the experience of men has shown that it is more probable that a man of ample means should do this, than one who was not financially able to do so.*

"But whether this be so or not, if such evidence would have had the tendency to make the fact as to the promise having been made more or less improbable, still it should have gone to the jury. The safer and more satisfactory rule is for the judge to admit whatever is relevant and leave the question of its weight for the jury."

In *Holman vs. Raynesford*, 44 Pacific Reporter (Kansas), 910, (1896), the Court held it relevant to show the circumstances surrounding the transaction in controversy, the relations of the parties to each other and to the transaction, for the purpose of aiding the jury in judging of the reasonableness of the respective claims of the parties, who testified directly contradictory to each other.

In the case on trial, the admitted evidence discloses that Captain Frank Loesewitz and Mr. Herman Keck were strangers; that he did not know Mr. Keck's name, but remembered his face; that Mr. Herman Keck was President of The Coetermans-Henricks-Keck Diamond Cutting Company, of Cincinnati, which company was engaged in cutting diamonds; that Mr. Herman Keck was a gentleman of large means, whose high character, reputation, and integrity was sustained by six of the leading business men of the City of Cincinnati, including its Mayor (original record, pp. 154–160; printed, pp. 80–83). The witness, Captain Frank Loesewitz, testified that he had never seen Mr. Keck but once in his

life, then for about fifteen to thirty minutes, in going from the residence of Mr. Van Hammelrick to the Café Alsacienne, drinking a glass of beer, Mr. Van Hammelrick handing Captain Loesewitz a package of diamonds, and walking a half square on the Place Verte; that the only words testified as having been spoken by Mr. Herman Keck, were "by Adams Express." Mr. Herman Keck, plaintiff in error, positively and categorically denied the alleged meeting and transaction. Under the rules laid down, and the circumstances stated, it can not be disputed that the evidence offered in behalf of Mr. Herman Keck, that he and his company dealt wholly in rough diamonds, could not use cut diamonds, never carried diamonds of the character alleged to have been smuggled, had no motive to smuggle, were relevant as rendering probable the testimony of Mr. Herman Keck and improbable that of Captain Frank Loesewitz as to the transaction alleged to have taken place in the Café Alsacienne and upon the Place Verte and the claimed identification of Mr. Keck.

We do not contend that a man without motive may not smuggle, but we do contend that the evidence offered had a tendency to show the probability of the testimony of Mr. Herman Keck and the improbability of this testimony of Captain Frank Loesewitz, especially as they directly contradicted each other as to the alleged main transaction. A Court has no discretion to exclude legal evidence merely because the trial judge does not attach much weight to it, as its weight is for the jury. Taken in its entirety, the testimony offered in the trial was the most important evidence that Mr. Keck had to offer. If the Court had admitted the evidence, as it should have done, it would have turned the scales and have been, at least, sufficient to raise a reasonable doubt, to the benefit of which the defendant was entitled. Mr. Justice Miller (at p. 470), in *Wiggins vs. People, etc., in Utah*, 93 U. S., 465, (1876).

Second. The Court sustained an objection to a question

(original record, p. 161; printed, p. 84) put to the witness, Mr. Constant Van Reeth, and the error arose as follows:

The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25), that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth, may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect (original record, p. 85; printed, p. 39). The piece of paper upon which Captain Loesewitz testified the stranger had written the name Van Reeth was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had, that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214–215; printed, p. 115).

This testimony was material because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he had known Captain Loesewitz for twelve years (original record, p. 174; printed, p. 92).

This assignment of error presents another question under the rules of relevancy. The prosecuting witness, Captain Frank Loesewitz, had been indicted three months before the finding of the indictment against Mr. Herman Keck, and for the same offenses charged against Mr. Herman Keck, and expected to better his condition by testifying against Mr. Keck (original record, p. 90; printed, p. 42). He has never to this day been put on trial. Although arrested February 11, 1896, and claiming to have given up the diamonds, and to have fully disclosed his relations thereto within a few days after his arrest, he did not disclose to anybody the claimed existence of or produce the paper containing the name Van Reeth until the hearing of Mr. Keck before the United States Commissioner, March 18th, 1896, although claiming to have carried the paper in his pocket since the claimed meeting in the Cafe Alsacienne, January 27, 1896. That the paper was spurious was evidenced by the long delay in producing it, the discrepancy between the letter T and the name Franz; the absence of evidence as to handwriting; that Mr. Franz Van Reeth testified that he had known Captain Loesewitz twelve years; that Captain Loesewitz admitted that he might have known the name F. Van Reeth and might have seen Mr. Van Reeth's picture in a paper. It was therefore competent to prove that in the newspapers read by Captain Loesewitz, Mr. Van Reeth's name and picture frequently appeared, accompanied by the statement that Mr. F. Van

Reeth had gone to Cincinnati to engage in the diamond business (original record, p. 161; printed, p. 84). This was especially important in view of the fact that the witness, Captain Loesewitz, did not know Mr. Keck by name (original record, p. 83; printed, p. 37) and that Captain Frank Loesewitz had ample opportunity and time during his trip to Europe between the date of his arrest, February 11th, 1896, and the hearing of Mr. Keck, before the United States Commissioner, February 18th, 1896, to manufacture this evidence, because it was on March 18th, 1896, he, for the first time, identified Mr. Keck. It is a fair hypothesis to say that Captain Frank Loesewitz may have manufactured this spurious paper, and the evidence offered tended to render *improbable* the evidence that Mr. Keck had given him the paper in the Cafe Alsacienne.

VI.

Charge of Court to Jury — Part Excepted to.

(1.) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court.

(2.) A charge of a Court to a jury should cover the whole case, and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt.

(2a.) The defendant was charged with importing contrary to law and with smuggling diamonds. A Sea Captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (a) that a friend in the presence of the defendant gave him the diamonds; (b) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (c) that he had been in the habit of bringing over similar small packages and *always* reporting them to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses or all of the testimony of one witness, and withdraw from the jury certain hypotheses material to the question of guilt.

The story told by Captain Frank Loesewitz on the witness stand has been heretofore given in substance (this brief, pp. 36–38). In reference to the same the Court charged the

jury as follows (original record, p. 208; printed, p. 112), to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

The portions of the charge of the Court excepted to, was erroneous for seven reasons, to wit:

First. The first count of the indictment had been demurred to as being insufficient in substance (this brief, pp. 22–25). Being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895).

Second. The second count of the indictment had been demurred to as being insufficient in substance, because diamonds were on the free-list, and not subject to duty (this brief, pp. 25–29). Being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895).

Third. The second count of the indictment had been demurred to as being insufficient in substance, because some diamonds were on the free-list under the generic term of "diamonds," and others were dutiable, and the indictment simply alleged the smuggling of "diamonds" without describing what kind of diamonds. (This brief, pp. 25–27; pp. 29–35.) Being thus fatally defective, and having been duly

demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895). This count in the case on trial arises under a different law, and is different in wording, from the counts in the case of *Dunbar vs. United States*, 156 U. S., 185 (1895). In the case cited, paragraph 48 of Section 1 of the act of October 1, 1890, Chapter 1244, 26 U. S Statutes at Large, 567 placed a duty of $12.00 per pound on opium "prepared for smoking" (opinion of Court, p. 189). The third count of the first indictment charged the smuggling of "prepared opium subject to a duty of $12.00 per pound" (statements of Court, p. 187). The second, fourth, and fifth counts of the second indictment charged the smuggling of "prepared opium subject to a duty of $12.00 per pound." (Statement Court, p. 187–8.) The Court held, that as but one kind of "prepared opium" was named in the statute, that it was unnecessary to have alleged that it was prepared "for smoking." The second indictment also stated that it was "prepared opium," subject to a duty of $12.00 per pound. In the case at bar the only word used was "diamonds," without prefix or suffix. In the case cited the adjective "prepared" was a prefix, which took it out of the generic term "opium." If the indictment had charged the smuggling of "opium subject to duty," the cases would, to that extent, been parallel. In the case cited, there was no demurrer to the indictment, while in the case at bar there was. In the case cited the indictment descended to particulars, but did so in a faulty *manner*; in the cast at bar the indictment gave a generic term, and did not descend to particulars; the *first* was a case of *form and manner* of allegation; the *latter, an omission of a matter of substance.* We have heretofore stated the law and allegations of this count (brief, pp. 29–35), and in addition to the cases there cited refer the Court to *United States vs. Hess*, 124 U. S., 483 (1887); *Pettibone vs. United States*, 148 U. S., 197 (1893); *Evans vs. United States*, 153 U. S., 584, 587 (1893); *United States vs. Mann*, 95 U. S., 580 (1877); *United States vs. Carll*, 105 U. S., 611, 612 (1881).

Fourth. We have heretofore contended that upon the facts there could be no legal conviction of smuggling or attempting to smuggle (brief, 35–48). This charge should have put certain hypotheses to the jury, which, if they found established from all the evidence beyond a reasonable doubt, to find the defendant guilty, and not two isolated occurrences forming but a part of the testimony of one witness. 2 Thompson on Trials, Section 2505.

Fifth. The third count of the indictment was attempted to have been drawn under Section 3028 of the Revised Statutes of the United States, in that there was a violation of Section 2802 of the Revised Statutes of the United States. This was duly demurred to. But as the Court instructed the jury to render a verdict of not guilty thereon (original record, p. 206; printed, 111), it takes it out of the discussion.

Sixth. This charge of the Court was erroneous because it did not cover the whole case. The rule is thus laid down in 2 Thompson on Trials, Section 2328, to wit:

"Instructions should cover the whole case, and should not be so framed as to single out isolated portions of the evidence not in themselves decisive. * * * * But the error of singling out isolated facts, not in themselves decisive of the merits of the controversy, and instructing the jury that if they believe such facts they will find for one party or the other, is not regarded as non-direction, but as mis-direction, and an invasion of the province of the jury. It is a frequent and penicious error, for which judgments are constantly reversed. * * * * On the trial of an indictment for an assault with intent to murder, the law presumes the defendant innocent of the felony, unless the whole evidence satisfies the jury that he made the assault with the particular intent alleged in the indictment. In such a case it is error for the Court, in charging the jury, to select from the mass of the evidence a portion only of the facts disclosed by it, and to declare that if such facts are proved, the law presumes that the act was malicious, and that the defendant intended to kill. Such a charge takes away from the defendant the presumption of innocence upon the selected facts only; whereas, according to law, that presumption can not be taken away except by a conviction of the guilt produced on the minds of the jury, by the whole evidence."

This rule has been frequently affirmed in numerous cases, in among others *Clement vs. Packer*, 125 U. S., 309 (1887); *Inland & S. Coasting Co. vs. Tolson*, 139 U. S., 551 (1891); *Adams vs. Roberts*, 2 Howard, 486 (1844); *Jewell vs. Jewell*, 1 Howard, 219 (1843); *Greenleaf vs. Birth*, 9 Peters, 292 (1838).

In *Clement vs. Parker*, 125 U. S., 309 (1887), while the trial court did not positively and imperatively direct the jury to find for the plaintiff, it was, in its logical effect, a syllogysm; its major premises was a general rule as to the effect of the absence of certain evidence and its minor premises that there was not said certain evidence (p. 327). The conclusion was easy, that *upon the evidence singled out*, to find for the plaintiff. Mr. Justice Lamar, who delivered the opinion of the Court reversing the judgment, said (p. 327) that:

"The direct tendency, if not the avowed purpose, of the statements contained in this charge, is to withdraw from the consideration of the jury a very considerable amount of pertinent and important testimony for the defense."

In this portion of the judge's charge excepted to, the court limited the inquiry to the testimony of Captain Loesewitz "*respecting his receipt of the package and bringing it here.*" The Court left to the jury no alternative but to find defendant guilty if they believed the Captain's testimony in these two particulars. It did not leave the jury all the evidence in the case, or even all of the evidence of Captain Loesewitz, but singled out two parts of the testimony of the Captain Loesewitz. This was to withdraw from the jury all the testimony of all the witnesses except two parts of the testimony of Captain Loesewitz. All other testimony, except, as it might bear upon the veracity of Captain Losewitz, was thus excluded. The defendant, Herman Keck, was presumed to be innocent until proven to be guilty beyond a reasonable doubt, and he was entitled to the benefit of any reasonable doubt arising from *all* the evidence. If there were any reasonable hypotheses consistent with his innocence or

inconsistent with his guilt, he should have been acquitted. The case turned on the claimed ability of the witness, Captain Frank Loesewitz, to identify Mr. Herman Keck, a stranger whose name he did not know, whom he had seen for less than half an hour, during which the stranger took no part in a conversation carried on in Flemish between Captain Loesewitz and Mr. Van Hammelrick. The only words claimed to have been spoken by Mr. Keck were the words "by Adams Express," testified to as having been spoken by him in English, after leaving the Cafe Alsacienne, and while on the Place Verte. There was no evidence that the diamonds were manufactured or purchased at Antwerp, and no Consular invoice was necessary. (Act June 10, 1890, 26 U. S. Statutes at Large 131, Section 3). These diamonds were personal effects accompanying Captain Frank Loesewitz, a passenger on his own vessel. (Same Act, Section 4.) The witness, Captain Frank Loseewitz, further testified that he had been in the habit of bringing over similar small packages, in the same way that he brought over the package involved in the case on trial, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury agents came aboard before he had an opportunity to go upon the dock. (Original record, pp. 81-82; printed, pp. 36-37.) The defendant was entitled to the benefit of the usual custom of the Captain in such matters, to show that there was no intention not to submit them to the officer of the revenue for examination. (Anti-moiety act, June 22, 1874, 18 U. S. Statutes at Large 186, Section 4.) This was a pertinent hypothesis, which the Court took from the consideration of the jury, when it limited their deliberations to the mere truthfulness of Captain Loesewitz's evidence on the two point of "*his receipt of the package of diamonds in Antwerp and bringing them here.*" The defendant was entitled to the benefit of the doubt, which might be raised, by the

uniform custom of the Captain in submitting such packages to the custom officials for examination. The jury might have believed the two propositions to which the jury were limited, and still had a doubt as to defendant's guilt. *There was nothing said at the Cafe Alsacienne as to smuggling of the diamonds, or omitting to submit the same to the officers of the revenue for examination, after the arrival of the ship in port.* If things had taken their usual course, and Revenue Officer Gallen had not been over zealous, in the ordinary course of events this package would have been submitted to the revenue officers for examination in a way different than they were submitted. (This brief, pp. 45–46.) The mere fact that Captain Loesewitz may have incurred penalties for the omission of formalities, does not affect the question of the charge contained in the second count of the indictment, or the fact that bringing over packages on former occasions, and submitting them to the officers of the revenue, had not subjected him to penalties. It was wrong for the Court to take from the jury all of the evidence of all of the witnesses, including Captain Loesewitz, except two very small portions of Captain Loesewitz's testimony, save as it might bear on Captain Loesewitz's veracity. This action of the Court was doubly prejudicial, as it was a case of identity and of oath against oath.

Seventh. Said portion of the charge was erroneous as it directed attention to the testimony of one witness to the exclusion of all other witnesses. 2 Thompson on Trials, Section 2421.

In *Ott vs. Oyer's Executors*, 106 Pa. St., 6 (1884), the Court, among other things, charged the jury (18) that:

"If, then, you are satisfied from the testimony of Phillips and Ott that when this note was given by William Ott to John Oyer," etc.

There had also been introduced the evidence of a witness named Bogardus.

The Court, in reversing the judgment because of this instruction, said:

"All the evidence tending to establish the facts in issue was for consideration of the jury, and in so far as the Court excluded it, there was error."

In the case on trial the Court practically excluded the testimony of all the witnesses except that of Captain Frank Loesewitz, and even limited his to two particulars.

In *Brown vs. The United States*, 159 U. S., 100 (1895), Brown was indicted for killing Josiah Poorboy. There was conflict in the evidence as to what occurred when the shooting took place, but it appears with reasonable certainty that Brown shot and killed either Whitehead or Poorboy (p. 102). The defendant requested the Court to instruct the jury that if the defendant believed the persons attempting his arrest were not officers, and the killing was done in resisting the arrest, the crime would be manslaughter, but not murder. The Court gave the instruction with the following modification (p. 102), to wit:

"Unless such killing was done *in such a way* as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder."

Mr. Justice Harlan, in delivering the opinion of the Court, said (p. 103) that:

"The jury might well have inferred, from the instruction, as modified, that they were at liberty to return a verdict of murder because alone of the *way* or *mode* in which the killing was done, even if they believed that, apart from the way in which the life of the deceased was taken, the facts made a case of manslaughter, and not of murder. We do not think that a verdict of guilty of manslaughter or murder should have turned alone upon an inquiry as to the way in which the killing was done. The inquiry rather should have been whether, at the moment the defendant shot, there were present such circumstances, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder."

VII.

Answer of Court to Request Number Ten for Special Instruction.

(1.) It is error for a Court in answer to the request for a special instruction to affirm said point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness.

(1a.) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt and inconsistent with any hypothesis of innocence. The Court answered affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charge as testified to by the prosecuting witness. The effect of such charge was to withdraw from the jury all of the evidence of all of the witnesses, except that of Captain Loesewitz, and confined his testimony to so much thereof as pertained to the smuggling charge, as testified to by him.

The error here assigned arose in the following manner, the Court, in its general charge to the jury, stated the following (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, p. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, *but the jury must be convinced beyond reasonable doubt, from the evidence*, that the defendant, Herman Keck, is guilty as charged. *Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence.*

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the 10th point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully

convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged, *as testified to, by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Herman Keck, plaintiff in error, duly excepted to the answer of the learned Court, to the request for said instruction number ten (original record, p. 208; printed, p. 112), and the ruling of the Court was duly assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

This action of the Court was erroneous in two respects:

First. The Court was asked to instruct the jury that they must be convinced beyond a reasonable doubt, from all the evidence, of the defendant's guilt. The Court said that it affirmed the point generally, but confined the investigation to the one question of being convinced, from all the evidence, that the defendant was guilty of smuggling charged, *as testified to by Captain Loesewitz*. This much of the question has been heretofore discussed under the part of the charge excepted to (brief, pp. 72–76), and is subject to the same criticism as the modification of the charge in *Brown vs. United States*, 159 U. S., 100, 102, 103 (1894).

Second. The Court was asked in this instruction to say that before the jury could find the defendant guilty the evidence must be consistent with hypothesis of guilt and inconsistent with hypothesis of innocence. The Court, in its answer, while affirming the tenth point generally, nullified the question of hypotheses by confining the question of guilt to the smuggling charged, *as testified to by Captain Loesewitz*. This practically excluded all presumptions of innocence, all the testimony of all the witnesses, except Captain Loesewitz, save as it might bear upon his veracity; and all testimony of Captain Loesewitz as to his general custom in bringing

over such packages, which would have supported the hypothesis that he intended, as in all former cases, to submit this package to the revenue officers for examination. Wharton Criminal Evidence (9th Edition), Section 21, last sentence; 2 Thompson on Trials, Section 2505.

VIII.

Error for Refusing Application for Dedimus.

(1.) Revised Statues of the United States, Section 866, which provides that any court of the United States may grant a *dedimus potestatem* in any case where it is necessary in order to prevent a failure or delay of justice, applies to criminal cases.

(1a.) A person charged with smuggling presented proof in support of an application for a *dedimus* that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (e) that from amount of the prosecuting witnesses's income and expenditures, a part of his income was derived from sources other than his wages; (f) record evidence of the prosecuting witness's prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure of justice, and the action of the Court was based upon a misapprehension of law and fact.

The indictment was returned against Mr. Herman Keck, plaintiff in error, the 18th day of May, 1896, and eight days later, to wit: the 26th day of May, 1896, Mr. Herman Keck, plaintiff in error, moved to quash the indictment, demurred thereto, and upon the Court overruling same, filed a written application for a *dedimus potestatem* to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof an affidavit was presented, setting forth important matters, which would clearly have

been material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said application, to which ruling of the Court Mr. Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day, by leave of court, the United States presented an answer to the application for the *dedimus potestatem* (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day, the Court refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22).

The provision of the Revised Statutes under which this application was made is as follows, to wit:

"SECTION 866. *In any case* where it is necessary, in order to prevent a failure or delay of justice, *any of the courts of the United States* may grant a *dedimus potestatem*, to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of Chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of Sections 863, 864, and 865 shall not apply to any depositions to be taken under the authority of this section."

The application, which was made eight days after the indictment was found, was as follows (original record, p. 18; printed, p. 6), to wit:

"Now comes the defendant, Herman Keck, and moves the Court for a *dedimus potestatem*, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, and the testimony to be taken is necessary to his defense, and is necessary in order to prevent a failure of justice."

In support of this an affidavit was filed setting forth (original record, pp. 19–27; printed, pp. 6–9; original record. pp. 48–54; printed, pp. 17–20), that (1) Captain Frank Loesewitz was in the habit and practice of smuggling and charging therefor; (2) that Captain Loesewitz had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (3) the exact nature of Mr. Herman Keck's business in Europe; (4) that from the amount of Captain Loesewitz's expenditures he must be deriving an income other than from his wages as captain; (5) record evidence as the Captain's connection with other smuggling transactions and prosecutions therefor, of which Mr. Herman Keck learned by cablegram eleven days before making his application for the *dedimus;* (6) that the general reputation of Captain Loesewitz for truth and veracity was bad.

The Government filed an answer, by leave of Court (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 55–57; printed, pp. 20–21), in which was set forth: (1) that Section 866 did not apply to criminal cases; (2) that the application came too late; (3) that the evidence went to the credibility of said Captain Loesewitz, as a witness, and that the defendant would have been concluded by his answers thereto; (4) that no notice was given of the application, and the same was not made conformable with common usage; (5) that there were no interrogatories filed; (6) that Herman Keck, plaintiff in error, had the means to procure the attendance of the witnesses; and (7) that the matter rested in the discretion of the Court.

The Court refused the application on two grounds in the following language (original record, pp. 33–35; printed, pp. 11–12; original record, pp. 57–58; printed, p. 22), to wit:

"The application referred to yesterday is refused on two grounds:

"*First.* That the statute relied upon is not applicable to the criminal court, nor to trials of causes therein.

"*Second.* That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of it avoided."

We will consider the answer of the Court in its two parts:

First. Section 866 of the Revised Statutes of the United States does apply to criminal cases, and it has been so ruled in *United States vs. Wilder*, 14 Federal Reporter, 393 (1882), and *United States vs. Cameron, et al*, 15 Federal Reporter, 794 (1883).

Circuit Court Judge Pardee, who delivered the opinion of the Court in *United States vs. Wilder*, 14 Federal Reporter, 393, said:

"It is so abhorant to all ideas of justice, that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case, may be, and probably is, unprecedented in the United States Courts in criminal cases, but I am informed is permitted in State Courts of Georgia, and is allowed by statute in other States. At all events, the Government can not be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined, and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be considered by the Judge who shall be called upon to exercise the large discretion given by the statute, in imposing sentence in the case. Let the commission issue as prayed for; the District Attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned ten days before the next term of this Court."

Judge McCreery delivered a very elaborate opinion (in which Judge Treat concurred) in the case of the *United States vs. Cameron et al*, 15 Federal Reporter, 794 (1883).

1 Foster's Federal Practice (2d Ed.), Section 288, p. 518, accepts these decisions without question.

Second. The learned Trial Court gave as a second reason for refusing the application, that the circumstances did not call for its application *at that time*. Captain Loesewitz's name appeared indorsed upon the indictment as the prosecuting witness. It was a case of oath against oath. It would become very important to impeach his testimony by documentary evidence and testimony of his bad reputation for truth and veracity. It was proper to show his business relations with the New Jersey merchant, with whom he admitted he had long relations of friendship (original record, pp. 72–73; printed, p. 31), and from whom Captain Loesewitz obtained a business card (original record, pp. 73–74; printed, pp. 31–32), which Captain Loesewitz gave to Mr. Van Hammelrick (original record, p. 75; printed, p. 32). The Court further stated that Herman Keck could have procured the presence of these witnesses from Europe. In this the learned Trial Court was clearly mistaken, because there was no evidence that they would cross the ocean, and it is not to be supposed that the business men mentioned in the affidavit, or Mr. Van Hammelrick, who was accused by Frank Loesewitz with being mixed up in the transaction, would come to America; and, in addition, there were other witnesses, whose names Mr. Herman Keck could not then give; and there was documentary evidence, information of which he had just received. The learned Trial Court further stated that the application came too late, as it might have been made months before. In this the learned Trial Court was clearly mistaken, both in law and in fact, because the indictment was returned eleven days before the application was made, and Mr. Herman Keck was arraigned on the 27th day of May, 1896, the day of the second

refusal of the application and the day following the first refusal thereof. To be sure, Mr. Keck had been arrested February 14, and bound over to the Grand Jury March 18, and indicted May 18, 1896. He was not compelled to anticipate an indictment, and had a right to rely on the protection of Article VI of the Amendments to the Constitution, that he could not be called upon *to answer* to a criminal charge until accused by the indictment of a Grand Jury.

If it be said that this was a matter within the discretion of the Trial Court, that discretion was grossly abused, and the conclusions of the learned Trial Judge in his attempted exercise of discretion was based upon erroneous conceptions of clear and admitted facts appearing upon the records of his own court.

The United States District Attorney claims he had no notice, but that he did have, is shown by his asking and obtaining leave of Court to file an answer (original record, p. 54; printed, p. 20), which was done.

It was unnecessary, as set forth in the answer of the District Attorney, that he should have been furnished with interrogatories, because the interrogatories are prepared and filed after the making of an order allowing the *dedimus*, as was done in the case of *United States vs. Wilder*, 14 Federal Reporter, 393 (1882). The same rule is laid down in 1 Foster's Federal Practice (2d Ed.), Section 288. At all events, the Court overruled the application upon two grounds mentioned in the answer, filed by the United States District Attorney, and virtually thereby overruled the other grounds. Nor, as contended by the learned District Attorney, does the manner of granting depend on common usage, but, as the statute says, the taking of the evidence, after the *dedimus* is issued, is to be according to common usage. (Rev. Stat. U. S., Sec. 866.)

Section 866 of the Revised Statutes of the United States provides for the issuing of a *dedimus potestatem* in any case where it is necessary, in order to prevent a failure or delay of

justice. The affidavit filed made out a *prima facie* case for a *dedimus*. The Court did not rule or find that it was not necessary in order to prevent a failure or delay of justice. If it had assigned this reason, a more difficult question might have arisen. But the Court gave other reasons for its refusal. Of course, we concede that the Court said that the application might have been made months before, and all delay in consequence of granting it avoided, but as the Court was laboring under a misapprehension of law and fact, an error was committed, and the action of the Court was not the exercise of discretion.

IX.

Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the Court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541.

(1a.) Where a person was indicted and convicted for a violation of Section 2865, and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania.

The Court having overruled a motion for a new trial, proceeded to pronounce sentence (original record, p. 45; printed, pp. 15-16), as follows, to wit:

"And thereupon, on the 9th day of June, A. D. 1896, all and singular, the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Herman Keck, pay to the United States a fine of $200.00; that he be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year; that he pay the costs of the prosecution, and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of said Commonwealth."

Revised Statutes of the United States, Section 5541, provides that in every case where any person is convicted of any

offense against the United States, is sentenced to imprisonment *for a period longer than one year*, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held. Supreme Court of the United States, in *Bonner's case*, 151 U. S., 242 (1894), held, that imprisonment in the said penitentiary was only permissible where the sentence was for a period longer than one year. In the case on trial the sentence was not longer than one year, and was but for one year and the payment of a fine. In the case cited the Court held that the sentence was null and void, as being beyond the power of the Court, and discharged the petitioner on a writ of *habeas corpus*. Nor does the act of July 12, 1876, 19 U. S. Statutes at Large, 88, amending Section 5546 of the Revised Statutes of the United States, in any way change the rule as declared in *Bonner's case*, 151 U. S., 242 (1894).

IN CONCLUSION.

The three counts of this indictment were fatally defective, as omitting matters of substance. All ways of raising their defects were taken, including a demurrer. The defendant was rushed into a trial eleven days after his accusation, and denied the privilege of taking testimony in Europe, where the main transaction was alleged to have taken place, where the prosecuting witness lived, whose testimony it was desired to impeach. The application for a *dedimus potestatem* was denied upon conclusions based upon premises, fallacious in law and fact. The case was oath against oath, and turned upon imperfect identification. Hearsay evidence was admitted and relevant evidence excluded. All the evidence admitted did not make a crime, on the counts of the indictment as drawn. The jury were confined to but small parts of the testimony of but one witness, and all other evidence was excluded, except as it might bear upon the veracity of the prosecuting witness.

Special instructions were modified to exclude, in effect, the doctrine that all the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence. An illegal sentence was imposed. Vital errors, prejudicial to the rights of Mr. Herman Keck, plaintiff in error and a citizen of the United States, were committed, and he was denied a fair and impartial trial, guaranteed to him by the Constitution of the United States, while an alien was shielded from attacks as to his veracity and criminality. This conviction should be set aside, the indictment quashed, and Mr. Herman Keck freed from an annoying prosecution, so that he might go about his way developing the new and great diamond cutting industry at Cincinnati, which he attempted to bring to the attention of the Court by his *dedimus potestatem* and the excluded evidence of the witness Mr. Franz Van Reeth.

Respectfully submitted,

RANKIN D. JONES,
FRANCIS B. JAMES,
Counsel for Herman Keck, Plaintiff in Error.

CINCINNATI, O., November 28, 1896.

In support of this an affidavit was filed setting forth (original record, pp. 19–27; printed, pp. 6–9; original record. pp. 48–54; printed, pp. 17–20), that (1) Captain Frank Loesewitz was in the habit and practice of smuggling and charging therefor; (2) that Captain Loesewitz had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (3) the exact nature of Mr. Herman Keck's business in Europe; (4) that from the amount of Captain Loesewitz's expenditures he must be deriving an income other than from his wages as captain; (5) record evidence as the Captain's connection with other smuggling transactions and prosecutions therefor, of which Mr. Herman Keck learned by cablegram eleven days before making his application for the *dedimus;* (6) that the general reputation of Captain Loesewitz for truth and veracity was bad.

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Judge McCreery delivered a very elaborate opinion (in which Judge Treat concurred) in the case of the *United States vs. Cameron et al*, 15 Federal Reporter, 794 (1883).

1 Foster's Federal Practice (2d Ed.), Section 288, p. 518, accepts these decisions without question.

Second. The learned Trial Court gave as a second reason for refusing the application, that the circumstances did not call for its application *at that time*. Captain Loesewitz's name appeared indorsed upon the indictment as the prosecuting witness. It was a case of oath against oath. It would become very important to impeach his testimony by documentary evidence and testimony of his bad reputation for truth and veracity. It was proper to show his business relations with the New Jersey merchant, with whom he admitted he had long relations of friendship (original record, pp. 72–73; printed, p. 31), and from whom Captain Loesewitz obtained a business card (original record, pp. 73–74; printed, pp. 31–32), which Captain Loesewitz gave to Mr. Van Hammelrick (original record, p. 75; printed, p. 32). The Court further stated that Herman Keck could have procured the presence of these witnesses from Europe. In this the learned Trial Court was clearly mistaken, because there was no evidence that they would cross the ocean, and it is not to be supposed that the business men mentioned in the affidavit, or Mr. Van Hammelrick, who was accused by Frank Loesewitz with being mixed up in the transaction, would come to America; and, in addition, there were other witnesses, whose names Mr. Herman Keck could not then give; and there was documentary evidence, information of which he had just received. The learned Trial Court further stated that the application came too late, as it might have been made months before. In this the learned Trial Court was clearly mistaken, both in law and in fact, because the indictment was returned eleven days before the application was made, and Mr. Herman Keck was arraigned on the 27th day of May, 1896, the day of the second

refusal of the application and the day following the first refusal thereof. To be sure, Mr. Keck had been arrested February 14, and bound over to the Grand Jury March 18, and indicted May 18, 1896. He was not compelled to anticipate an indictment, and had a right to rely on the protection of Article VI of the Amendments to the Constitution, that he could not be called upon *to answer* to a criminal charge until accused by the indictment of a Grand Jury.

If it be said that this was a matter within the discretion of the Trial Court, that discretion was grossly abused, and the conclusions of the learned Trial Judge in his attempted exercise of discretion was based upon erroneous conceptions of clear and admitted facts appearing upon the records of his own court.

The United States District Attorney claims he had no notice, but that he did have, is shown by his asking and obtaining leave of Court to file an answer (original record, p. 54; printed, p. 20), which was done.

It was unnecessary, as set forth in the answer of the District Attorney, that he should have been furnished with interrogatories, because the interrogatories are prepared and filed after the making of an order allowing the *dedimus*, as was done in the case of *United States vs. Wilder*, 14 Federal Reporter, 393 (1882). The same rule is laid down in 1 Foster's Federal Practice (2d Ed.), Section 288. At all events, the Court overruled the application upon two grounds mentioned in the answer, filed by the United States District Attorney, and virtually thereby overruled the other grounds. Nor, as contended by the learned District Attorney, does the manner of granting depend on common usage, but, as the statute says, the taking of the evidence, after the *dedimus* is issued, is to be according to common usage. (Rev. Stat. U. S., Sec. 866.)

Section 866 of the Revised Statutes of the United States provides for the issuing of a *dedimus potestatem* in any case where it is necessary, in order to prevent a failure or delay of

justice. The affidavit filed made out a *prima facie* case for a *dedimus*. The Court did not rule or find that it was not necessary in order to prevent a failure or delay of justice. If it had assigned this reason, a more difficult question might have arisen. But the Court gave other reasons for its refusal. Of course, we concede that the Court said that the application might have been made months before, and all delay in consequence of granting it avoided, but as the Court was laboring under a misapprehension of law and fact, an error was committed, and the action of the Court was not the exercise of discretion.

IX.

Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the Court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541.

(1a.) Where a person was indicted and convicted for a violation of Section 2865, and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania.

The Court having overruled a motion for a new trial, proceeded to pronounce sentence (original record, p. 45; printed, pp. 15–16), as follows, to wit:

"And thereupon, on the 9th day of June, A. D. 1896, all and singular, the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Herman Keck, pay to the United States a fine of $200.00; that he be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year; that he pay the costs of the prosecution, and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of said Commonwealth."

Revised Statutes of the United States, Section 5541, provides that in every case where any person is convicted of any

offense against the United States, is sentenced to imprisonment *for a period longer than one year*, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held. Supreme Court of the United States, in *Bonner's case*, 151 U. S., 242 (1894), held, that imprisonment in the said penitentiary was only permissible where the sentence was for a period longer than one year. In the case on trial the sentence was not longer than one year, and was but for one year and the payment of a fine. In the case cited the Court held that the sentence was null and void, as being beyond the power of the Court, and discharged the petitioner on a writ of *habeas corpus*. Nor does the act of July 12, 1876, 19 U. S. Statutes at Large, 88, amending Section 5546 of the Revised Statutes of the United States, in any way change the rule as declared in *Bonner's case*, 151 U. S., 242 (1894).

IN CONCLUSION.

The three counts of this indictment were fatally defective, as omitting matters of substance. All ways of raising their defects were taken, including a demurrer. The defendant was rushed into a trial eleven days after his accusation, and denied the privilege of taking testimony in Europe, where the main transaction was alleged to have taken place, where the prosecuting witness lived, whose testimony it was desired to impeach. The application for a *dedimus potestatem* was denied upon conclusions based upon premises, fallacious in law and fact. The case was oath against oath, and turned upon imperfect identification. Hearsay evidence was admitted and relevant evidence excluded. All the evidence admitted did not make a crime, on the counts of the indictment as drawn. The jury were confined to but small parts of the testimony of but one witness, and all other evidence was excluded, except as it might bear upon the veracity of the prosecuting witness.

Special instructions were modified to exclude, in effect, the doctrine that all the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence. An illegal sentence was imposed. Vital errors, prejudicial to the rights of Mr. Herman Keck, plaintiff in error and a citizen of the United States, were committed, and he was denied a fair and impartial trial, guaranteed to him by the Constitution of the United States, while an alien was shielded from attacks as to his veracity and criminality. This conviction should be set aside, the indictment quashed, and Mr. Herman Keck freed from an annoying prosecution, so that he might go about his way developing the new and great diamond cutting industry at Cincinnati, which he attempted to bring to the attention of the Court by his *dedimus potestatem* and the excluded evidence of the witness Mr. Franz Van Reeth.

Respectfully submitted,

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CINCINNATI, O., November 28, 1896.